CASE AND COMMENT

Vol. 17 DECEMBER, 1910 No. 7

# Law Governing Construction of Devise of Real Property

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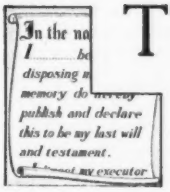
In the na
I be
disposing
memory do
publish and declare
this to be my last will
and testament.
executor

THE tendency of the courts, especially noticeable in cases dealing with conflict of laws, to create misleading precedents by misstating or overstating the principles applicable to the subject, even when the decisions themselves are right upon the facts, is illustrated by the recent case of Peet v. Peet, 229 Ill. 341, 82 N. E. 376, 11 A. & E. Ann. Cas. 492, 13 L.R.A. (N.S.) 780. The court there declares in general terms that the construction of a devise of real property, in the sense of ascertaining the testator's intention, is governed by the *lex rei sitæ,* and not by the *lex domicilii,* in case of a conflict between the two. The court, however, concedes that if by the domiciliary law the words employed in the devise have a meaning different from that which they bear in the state in which the subject of the devise is situated, that law may be proven, not to establish a rule of law binding on the court charged with the proper interpretation of the will, but simply as a fact or circumstance to enable the court to arrive at a correct conclusion under the law of the forum. The court seems to be more fortunate in its concession than in its statement of the general principle. The purpose for which, it is thus conceded, the domiciliary law may be proven is, from the nature of the question, the only purpose for which any extrinsic law, whether the *lex rei sitæ* or *lex domicilii,* may be legitimately invoked when the question involved relates to the intention of the testator, that is, his actual intention.

Since, therefore, the concession covers the entire field so far as construction in this sense is concerned, it seems to be irreconcilable with the general proposition that construction—which the court expressly declared to be equivalent to ascertaining the intention of the testator,—is governed by the *lex rei sitæ;* and can hardly be treated as an exception to that proposition. The term "construction" broadly used may embrace the effect of the devise, as well as the intention of the testator in respect thereto; and had the general proposition of the court been limited to that phase of construction it would have been beyond criticism; but as already indicated by the court's own definition it is construction in the sense of ascertaining the testator's intention, which is by that statement referred to the *lex rei sitæ.*

The necessity of invoking any extrinsic law in order to ascertain the intention of the testator, and therefore the necessity of choosing between the *lex rei sitæ* and *lex domicilii* in case of a conflict, arises only when the language of the will is susceptible of different interpretations or falls short of expressing the full, complete, and specific intention of the testator. In that situation the extrinsic law, regarded as one of the facts or circumstances surrounding the testator, may serve to remove the ambiguity arising from the language of the will or to complete and render specific the intention partially or generally expressed therein. This is obviously the only bear-

ing that the extrinsic law can properly have on the case so long as the effort is to ascertain the intention ambiguously or partially expressed in the will. In this connection the extrinsic law, whether *lex domicilii* or *lex rei sitæ,* does not perform its ordinary and legitimate function of prescribing a rule operating *ex proprio vigore* to determine the respective rights of the parties. At this point, however, a distinction is to be observed between invoking an extrinsic law in order to ascertain the actual intention of a testator, and invoking such a law as a rule of property to be applied irrespective of the actual intention. The distinction is apt to be obscured by the fact that rules which are in reality rules of property applicable irrespective of the testator's actual intention, are sometimes treated as though they rested on the presumed intention of the testator or operated to ascribe a particular intention to him. Whether or not this is a correct view of the foundation and operation of such a rule, it is obvious that, the presumption on which the rule rests and the intention which it ascribes to the testator being conclusive, the inquiry stops as soon as the conditions on which the rule operates appear, and there is then no question of ascertaining the testator's actual intention. The distinction may be illustrated by comparing the operation of the rule in Shelley's Case (assuming that in the particular jurisdiction that rule is regarded as a rule of property, and not as a rule of construction), and the effect of the statute of descent upon a devise to one and his "heirs." In the first case, upon the assumption that the rule is a rule of property, it operates *ex proprio vigore* as soon as the conditions of its application appear, irrespective of any intention disclosed by the will itself. In the second case, however, the statute of descent does not operate *ex proprio vigore,* as it would in case of intestacy, but is merely a fact or circumstance—the significance and weight of which vary with the language of the will as a whole and with the other facts and circumstances surrounding the testator—bearing on the question whom the testator intended to designate by the term "heirs." Doubtless, when the will, regarding all parts thereof and viewing it in the light of all the surrounding facts and circumstances, is destitute of all other indications of the testator's intention in this regard, the proper statute of descent will prevail, and in this situation it approximates, in practical effect, closely to a rule of property, or, in other words, to a rule which conclusively ascribes a particular intention to the testator irrespective of his actual intention. Nevertheless, even in this situation the statute prevails not because it operates as a rule of property, but because it happens that there is nothing to overcome its significance as a fact or circumstance illustrating the testator's intention.

It is clear that, so far as rules of property are concerned, a devise of real property is governed by the *lex rei sitæ,* and not by the *lex domicilii.* It is, however, by no means so clear that the *lex rei sitæ* will prevail over the *lex domicilii* so far as the question of construction, in the sense of ascertaining the intention of the testator, is concerned. In the first place it is apparent from the nature of the question that no hard-and-fast rule can be applied to it, since the will as a whole viewed in the light of the surrounding facts and circumstances, even when it does not directly express the testator's full intention, may point to the probability that he had the law of a particular state in mind. The fact, for instance, that he was familiar with the statute of descent of the state in which the land is situated may bear somewhat in favor of the *lex rei sitæ,* and, on the contrary, the fact that he was familiar with the statute of descent of his domicil and unfamiliar with that of the other state, may bear somewhat in favor of the *lex domicilii.* And there are many other possible facts and circumstances that may be entitled to consideration. The question, therefore, like any other question bearing on the intention of the testator, depends very largely upon the facts of the particular case.

When, however, the case is destitute of all other indications of the testator's intention as to the governing law, it seems more in accord with the probabilities to assume that he had in mind the law of his domicil, with which he was

presumably familiar, than that he was speaking with reference to the law of a foreign state or country with which he had no relation except that the subject of the devise was situated there. As a matter of fact, when the specific question as to the law to be invoked where the devise is to one and his "heirs" has been presented, the courts, in the absence of indications of a contrary intention, have adopted the *lex domicilii*, rather than the *lex rei sitæ*, for the purpose of determining the particular devisees included under that term.[1]

And the Mississippi supreme court[2] in a recent case has declared in general terms that, notwithstanding the well-settled rule that the title of real estate is governed solely by the law of the place where the property is situated, yet, when the inquiry is directed solely to the ascertainment of the meaning and intention of the testator from the language employed by him in the will, the *lex domicilii* controls. One argument advanced by text writers in support of this view is that a contrary rule might operate to impute to the testator a different intention with respect to each of several parcels of real property covered by the same devise, if the parcels were located in different states. Doubtless many cases may be found in which the general principle that wills of real property are governed by the *lex rei sitæ* is stated in terms broad enough to cover the question of construction, in the sense of ascertaining the testator's intention. In most of these cases, however, the question involved was either as to the formal or essential validity of the will, or its effect, as distinguished from its construction in the sense of ascertaining the testator's intention. This, indeed, appears to be true of the Peet Case. The question there involved was whether a devise by a testator domiciled in New York, of real property in Illinois, was governed by the Illinois statute, which in effect declares that in case a child for whom no provision is made, is born to the testator after the execution of the will, the devises and legacies shall abate to raise the portion to which the child would have been entitled had the testator died intestate, unless it appears by the will that it was the testator's intention to disinherit such child. The New York statute proved in the case was to the same effect except that, in terms at least, it contained no exception in case of the manifestation of an intention in the will to disinherit the child. It was apparently assumed in this case that if the New York statute were to be applied it would preclude any inquiry as to the testator's intention. While, as already indicated, the court regarded the question involved as one of construction of the will in the sense of ascertaining the testator's intention, it is not apparent how either statute is capable of throwing any light on the testator's intention. That intention must be, and in fact was, determined from the will itself viewed in the light of the facts and circumstances surrounding the testator. To have applied the New York statute, upon the assumption that it precluded any inquiry as to the testator's intention, would have been to apply not a rule of construction, but a rule of property, prevailing at the domicil, or what amounts to practically the same thing, a rule conclusively ascribing to the testator an intention not to disinherit the afterborn child. Upon the other hand, in applying the Illinois statute to the situation, the court merely applied a rule of property of the *lex rei sitæ*, not indeed a rule of property conclusively ascribing a particular intention to the testator, but a rule of property which throws open the question of the testator's actual intention.

If this view of the question actually before the court is right, the general statement of the court referring the question of construction, in the sense of ascertaining the intention of the testator, to the *lex rei sitæ*, was uncalled for, inconsistent with its concession previously referred to, and the result of the failure to distinguish between the construction of the devise, in this sense, and its effect under rules of property. The concession, if read in connection with the general proposition, serves as an antidote, and will probably prevent a misapprehension of the effect of the case as

[1] See Guerard v. Guerard, 73 Ga. 506; Keith v. Eaton, 58 Kan. 732, 51 Pac. 271.

[2] Ball v. Phelan, 94 Miss. 293, 49 So. 956, 23 L.R.A.(N.S.) 895.

a precedent. The general proposition, however, read without the concession, is calculated to create a false impression, and apparently align the case in support of a principle broader than the court intended to assert.

Since any general principle, whether it calls for the *lex rei sitæ* or *lex domicilii*, which may be adopted for the guidance of the courts in choosing which of the conflicting laws is to be regarded in resolving ambiguities in the language of the will, or in completing the intention but partially expressed therein, connotes but the one circumstance that the testator was domiciled in one state or country and the subject of the devise was situated in another, it may be easily displaced by additional facts and circumstances which may be properly brought to bear on the testator's intention. Indeed, it is possible that both *lex rei sitæ* and *lex domicilii* may be displaced and the law of a third jurisdiction invoked, by reason of indications in the will or in the surrounding facts and circumstances that the testator had that law in mind. As an abstract proposition, however, and within the limits in which any general principle on this subject must necessarily operate, the weight of authority seems to support the view that it is the *lex domicilii*, rather than the *lex rei sitæ*, that is to be regarded in the construction of a devise of real property, in the sense of ascertaining the testator's intention in respect thereof, as distinguished from the effect of the devise under rules of property.

NOWHERE do the infirmities of human nature appear in all their hideous nakedness, and nowhere do the hallowed and sometimes unsuspected virtues of commonplace lives shine forth with so clear a lustre, as in the musty records of the probate court. Those faded and yellow documents reveal the secret springs of human nature as they are revealed nowhere else this side of the final judgment seat. To a student of human nature, the open pages of a dead man's will, no matter how long ago he may have penned the words, have an absorbing interest from the volumes that may be read between the lines. The whole gamut of human passions finds expression in such instruments: pride, ambition, love, hypocrisy, avarice, charity—every motive from saintly benevolence to malignant revenge.—

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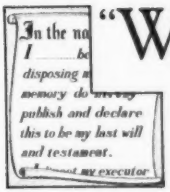
# Lay Views of Testamentary Capacity

BY HENRY C. SPURR




"WAS the testatrix, in your opinion, of unsound mind?"

This question was not long ago put to a policeman on the witness stand, in a contest over the will of a woman who, to the consternation of relatives, left $60,000 to charity. The officer, with a solemnity of manner indicating that he fully appreciated the importance of the inquiry, answered in the affirmative.

"Why," he said, "she would order me from in front of her house, saying, 'I don't need a policeman; you are never around when you are needed, anyhow.'"

The judge turned to the witness in undisguised surprise, and, with a touch of sarcasm in his voice, asked:

"Do you think she was insane, because she said that policemen could not be found when wanted?"

"Yes," was the response.

The answer raised a laugh in the court room; and yet, while it must be admitted that this—to use a popular expression—is going some as a test of insanity, still it would hardly do to say that it is a record breaker, among the strange views entertained by laymen as to what will disqualify a person from disposing of his property by will. Those who might have been the favored objects of the bounty of a decedent, and their friends and neighbors, set up an extreme standard of testamentary capacity. The body must have been in a high state of preservation and the intellect in a most perfect condition of integrity to enable a person dying, to thwart the wishes of the living. Above all, he must have spoken with understanding and acted with circumspection at all times and places, if he expected to get an unpopular will through without having a detailed account of his physical and mental peculiarities spread upon the minutes of the court.

A witness was once asked why he thought that, at a certain time, the testator's mind was wavering.

"Because," he replied, "when I asked him where the women were, he said, 'Was sagt,' and looked queer." [1]

So, the good old German, who had responded to a question he had failed to understand, in a perfectly natural manner, was, because not comprehended by the witness, deemed unfit to make a will.

In a Michigan case [2] a woman swore that she thought the testatrix was competent to execute a deed, but not a will. "A will," she explained, "is very different." And this is a very good illustration of the singular impression prevalent among laymen, that a much higher degree of mental capacity is required to make a final disposition of one's property than is needed to make a deed or contract, and the logic is that a will is very different.

It may therefore be somewhat astonishing to laymen holding such extreme views to learn that one may have the capacity necessary to make a valid will, although he smokes fifteen cigars a day,[3] goes fishing and hunting without result,[4] loses his way in returning from church,[5] refuses to decide upon selling a crop of grain,[6] or mistakes squirrel tracks for rabbit tracks when there are no rabbits in the vicinity,[7] and that a mother may fail to take the advice of her son as to the disposition of a piece of real estate;[8] and that a man may ask 10 cents a pound for shoats, when the market price for hogs is 6 cents,[9] without being mentally incompetent for the testamentary act.

[1] Cauffman v. Long, 182 Pa. 73.
[2] Hoban v. Campau, 52 Mich. 346, 17 N. W. 797.
[3] Berry v. Safe Deposit & T. Co. 96 Md. 45, 53 Atl. 720.
[4] Scarborough v. Baskin, 65 S. C. 558, 44 S. E. 63.
[5] Wilson v. Hays, 109 Ky. 321, 58 S. W. 773.
[6] Cauffman v. Long, 82 Pa. 73.
[7] Re Lewis, 51 Wis. 101, 7 N. W. 829.
[8] Re Bowers, 27 Pittsb. L. J. N. S. 237.
[9] Graham v. Deuterman, 244 Ill. 124, 91 N. E. 61.

A testator's walk may become less elastic than usual and degenerate into a shuffling gait;[10] he may walk the streets with no particular object in view, and have a serious, solemn expression, when walking;[11] he may partially lose his hair and teeth, and the use of his legs to such an extent as to require crutches;[12] he may talk wildly after being run over by a railroad car;[13] being old, he may beg his granddaughter to play the piano, and then, contrary to his accustomed dignity, dance in the presence of guests;[14] he may believe that the enfranchisement of women will work the downfall of the Republic;[15] he may undergo for a short time the extremes of sorrow and depression at the loss of his wife;[16] or, on the other hand, may play a violin when his wife is dead in the house,[17] without losing the right to dispose of his property.

So, one is not mentally incompetent to make a will, although he has unbounded faith in a certain patent medicine, using it to an excessive degree and recommending it to others;[18] or believes in witches and "spooks";[19] or plants corn with a handkerchief on his head;[20] or contemplates erecting a monument 100 feet higher than any known monument or pyramid;[21] or gathers stones and pebbles from the seashore to ornament his garden;[22] or fails to call a doctor to treat him for indigestion;[23] or searches for the buried treasures of Captain Kidd;[24] or keeps chickens in his house;[25] or provides kennels for dogs in his drawing-room;[26] or loves money and calls a security his god;[27] or mistakes property for blessedness;[28] or uses blasphemous language when racked with pain;[29] or bequeaths an estate to a society for the prevention of cruelty to animals, on the theory that men's souls, after death, pass into the bodies of animals.[30]

And, finally, it may astonish a layman to know that one may direct that his bowels be converted into fiddle strings;[31] be under the delusion that he had lost a thumb;[32] believe that one half of his body is dead, that he breathes only with one lung, that only one half of his heart performs its functions, and that he is a double man;[33] or fancy he cannot drink milk or eat salt or butter, and be averse to eating meat;[34] or even fail to believe in the saving efficacy of infant baptism and the doctrine of the real presence,[35] —and still be able to will his property contrary to the wishes of others.

One of the most striking examples of the extent to which a person may be indulged in his eccentricities of beliefs and manners, without affecting his testamentary capacity, is afforded by a South Carolina case: In this case the testator, among other things, believed that all women were witches, and would not sleep on a bed made by a woman; he thought some of his relations were in his teeth, and, to get them out, had fourteen sound teeth drawn; he had the quarters of his shoes cut off, saying that if the Devil got into his feet, he could drive him out the easier; he had holes cut on each side of his hat, so that if the Devil came in on one side, he could drive him out on the other; he always shaved his head close, so that in a contest with the witches they might not get hold of his hair; and also, for the purpose of making his wits glib, he had swords of all sizes and shapes

[10] Berry v. Safe Deposit & T. Co. 96 Md. 45, 53 Atl. 720.
[11] Tarr's Estate, 3 Pa. Co. Ct. 319.
[12] Bush v. Lisle, 89 Ky. 393, 12 S. W. 762.
[13] Carroll v. Norton, 3 Bradf. 291.
[14] White v. Starr, 47 N. J. Eq. 244, 20 Atl. 875.
[15] Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6.
[16] Ouachita Baptist College v. Scott, 64 Ark. 349, 42 S. W. 536.
[17] Bennett v. Hibbert, 88 Iowa, 154, 55 N. W. 93.
[18] Winn v. Grier, 217 Mo. 420, 117 S. W. 48.
[19] Van Guysling v. Van Kuren, 35 N. Y. 70.
[20] Bennett v. Hibbert, 88 Iowa, 154, 55 N. W. 93.
[21] La Bau v. Vanderbilt, 3 Redf. 384.
[22] Forman's Will, Tucker, 205.
[23] Wallace v. Whitman, 201 Ill. 59, 66 N. E. 311.
[24] Thompson v. Quimby, 2 Bradf. 449.
[25] Re Murphy, 41 App. Div. 153, 58 N. Y. Supp. 450.
[26] Yglesias v. Dyke, Prerog. Ct. 2 Taylor, Med. Jur. 556.
[27] Ivison v. Ivison, 80 App. Div. 599, 80 N. Y. Supp. 1011.
[28] Eddey's Appeal, 109 Pa. 406, 1 Atl. 425.
[29] Bush v. Lisle, 89 Ky. 393, 12 S. W. 762.
[30] Bonard's Will, 16 Abb. Pr. N. S. 128.
[31] Morgan v. Boys, 2 Taylor, Med. Jur. 555.
[32] Jones v. Goodrich, 5 Moore, P. C. C. 16.
[33] Hollinger v. Syms, 37 N. J. Eq. 227.
[34] Jenckes v. Probate Court, 2 R. I. 255.
[35] Hartwell v. McMaster, 4 Redf. 389.

made,—fifteen or twenty in the course of a year,—which he was always altering,—one 4 feet long, with two edges; another 11 inches wide by 14 long, with a handle, and made by a neighboring blacksmith to enable him to fight the Devil and witches with success. In the daytime he dozed in a hollow gum log for a bed, and at night kept awake, contending against the Devil and witches. At one time he fancied he had the Devil nailed up in the fireplace, in one end of his house, and by a mark across his room, over which he would never pass, he never suffered the floor to be swept. He dwelt in a house worse than any of his negro houses, and his bed was a split hollow gum log, with one or two blankets, and in this gum he would sometimes keep two or three razors and as many pistols. He had no chair or table or platter or dishes or plates. He ate with a forked stick, and would not drink out of a tumbler after another person, to avoid harm. A few years before his death he went to live with a certain person, who would not receive him into his family, but who built a house for him, about 12 feet square. The testator complained that it was too large, and had one built 3 feet wide, 5 feet long, and 4 feet high, in which he ate, slept, and dozed away his time. His wearing apparel, at the time of his death, was appraised at $1.[36] In spite of all of these singularities he was held competent to make a will, having been shown to have good business capacity and to have conversed sensibly on most subjects.

On the other hand, a testator who took borax "to weld up his inwards;" who refused to take food until others had taken of it, for fear of poison; who asserted that chloroform angels had saturated his bedclothing to kill him; that his relatives and Indians were endeavoring to shoot him; who always put a quantity of salt in his tea to destroy the poison which he claimed had been put into it to kill him; who sometimes for half a day at a time would dig into the earth with an old bayonet to kill devils; who dug holes about 2 feet deep around his house, poured in water to drown out the devils; and who did many other things of a similar nature,—was held not to possess testamentary capacity, where the will bequeathed to his executor, a gentleman of the highest character, a sum large enough to be over and above a bribe that might be offered to him by the brothers and sisters of the testator "for the redemption of this will and their heirship to my estate," and disinherited every relative, and gave his estate to charities.[36a]

So, while a man's eccentricities and delusions are a part of his liberties, disappointed relatives may find some ground to stand upon, if he hears too many voices in the whistling wind, or receives too many spiritual visitors, since such manifestations may affect the testamentary act itself.[37]

He must not let his belief that he is the son of George IV., and that when he was born a large sum of money was placed in his father's hands in trust for him; that he was robbed of it by his father by a diversion of a part of the trust fund from him to his brother;[38] or the belief that his wife, who is old, is maintaining improper relations with clergymen of advanced years and high character,[39]—affect the making of the will. Being a white man, married to a white woman, he must not labor under the delusion that he is the father of a mulatto child;[40] and, it would seem that he must not entertain too seriously the notion of establishing a stone quarry on the planet Saturn.[41]

In conclusion, it may be said that the courts have been able only in a very general way to define testamentary capacity, and that the question is regarded as more properly one of fact than of law.

[An exhaustive discussion of the question "what is testamentary capacity" may be found in Mr. Spurr's note appended to the case of Slaughter v. Heath, 27 L.R.A.(N.S.) 1.—Ed.]

[36] Lee v. Lee, 4 M'Cord, L. 183, 17 Am. Dec. 722.

[36a] Re Lockwood, 2 Connoly, 118, 8 N. Y. Supp. 345.

[37] American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619.

[38] Smee v. Smee, L. R. 5 Prob. Div. 84.

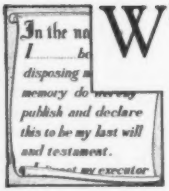
[39] American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619.

[40] Florey v. Florey, 24 Ala. 241.

[41] McReynolds v. Smith, 172 Ind. 336, 86 N. E. 1009.

# Some Wills of Noted Lawyers

BY WALTER M. GLASS


In the na
I be
disposing
memory do hereby
publish and declare
this to be my last will
and testament.
my executor

WHETHER the old saying that "a lawyer who tries his own case has a fool for a client" is applicable to Samuel J. Tilden in the matter of drawing his will is not known. It was thought for some time that the will was drawn, or at least approved, by Charles O'Conor and James C. Carter, two of the most eminent lawyers in New York; but later statements, made on what is apparently good authority, are to the effect that they had nothing at all to do with the will, and consequently it is not definitely known who was responsible for it. It would hardly seem possible that Mr. Tilden himself could have made such a mistake had he been acting for someone else. The statement has been made that Mr. Tilden had some doubts as to the validity of those clauses which the court subsequently condemned, and had spoken to Mr. Carter about it, but nothing more came of it.

In summing up the provisions of the Tilden will, the court, in holding it invalid (Tilden v. Green, 130 N. Y. 29, 14 L.R.A. 33, 28 N. E. 880), stated that the testator in substance said: "I have determined to devote my estate to charitable, educational, and scientific purposes. I have formed no detailed plan how that purpose can be executed, but under the law of New York it must be done through and by means of a corporation. I request you to cause to be incorporated an institution to be called the 'Tilden Trust,' with capacity to maintain a free library and reading room in the city of New York, and such other educational and scientific objects as you shall designate; and, if you deem it expedient,—that is, if you think it advisable, and the fit and proper thing to do,—convey to that institution all or such part of my residuary estate as you choose; and if you do not think that course advisable, then apply it to such charitable, educational, and scientific purposes as in your judgment will most substantially benefit mankind."

It will be noted that the discretion of the trustees was indefinite both as to the amount which they were to give to the corporation to be formed, and also as to whether they should give any at all to the incorporation; and the validity of the bequest was denied upon the ground of this complete discretionary power to convey or not to convey to the suggested beneficiary. The trustees procured the incorporation of the "Tilden Trust," and elected to convey to it the entire property, but the court held that the invalidity of the charitable trust because of its uncertainty could not be cured by anything done by the trustees to execute it.

In striking contrast with the Tilden will is that of his eminent contemporary in law and politics, Roscoe Conkling, the text of which is as follows: I, Roscoe Conkling, of Utica, make, publish, and declare my last will and testament as follows: I give, devise, and bequeath to my wife, Julia, and to her heirs and assigns forever, all my property and estate, whether real or mixed, and I constitute and appoint my said wife sole executrix of this my last will. It would undoubtedly take a better lawyer than even Mr. Conkling to break his will.

In passing upon the validity of the will of President James K. Polk, a Tennessee court of chancery said: "This will was written by the testator, with his own hand, in the executive mansion at Washington, at a time when he was President of the United States. He was a lawyer of recognized ability, had filled many high public offices with distinction, and reflected great honor upon his state. His will was witnessed by a law partner and a Senator in Congress, and named as executor one of the justices of the Supreme Court of the United States. It comes to us with the impression of having been carefully thought out before it was formally put down and published as his last testament." Among other provi-

sions, his home, known as Polk Place, situated in the city of Nashville, was given to his wife for life, and upon her death it was bequeathed to the state of Tennessee in trust to be occupied and enjoyed "by such one of my blood relatives having the name of Polk as may be designated by the said state," and if there were no blood relatives of that name, then "by such other of my blood relations as may be designated by the said state to execute this trust." The occupant was to keep the same in repair and prevent it from dilapidating or falling into decay, to pay the taxes, and to preserve and keep in repair "the tomb which may be placed or erected over the mortal remains of my beloved wife and myself, and shall not permit the same to be removed, nor any buildings or other improvements be placed or erected over the spot where said tomb may be."

This will was declared invalid as tending to establish a perpetuity. It was not a gift for public charity, and was merely an attempt to retain the property for the use of the blood relatives of the testator. In regard to the provisions for the preservation of the testator's tomb, the court said: "It were better to let some tombs pass into the hands of strangers, and fall into ruins, than to permit every testator to devote to his own grave as much land as his own taste might suggest or his purse could bear, and thus withdraw it forever from business relations."

There can be no doubt that the will would have established a perpetuity, and consequently was invalid, but the case would seem to be one in which, if the court had had any discretion in the matter, it might have been exercised to sustain the will, which had for its main purpose the preservation of the tomb of one of the Presidents; and this especially since Polk left no direct descendants, and the bill in chancery to set aside the will was filed by a large number of claimants, some of whom had but a one three-hundred-and-thirty-seventh interest therein.

The will of Francois Xavier Martin, presiding judge of the supreme court of Louisiana, was in the holographic form and as follows: "I institute my brother, Paul Barthelemy Martin, heir to my whole estate, real and personal, and my testamentary executor and detainor of my estate. In case of his death, absence, or disability, I name my friend and colleague, Edward Simon, my testamentary executor and detainor of my estate. New Orleans, this twenty-first day of May, eighteen hundred and forty-four." It would seem that a will so short and concise could not be attacked upon any ground, so long as there were no direct descendants of the testator, and all of the property was left to his nearest relative, but nevertheless the will was attacked by the state, and a very bitter contest ensued. The brother to whom the property was left was a resident of the state, and consequently the estate would not be subject to any taxation, where in the absence of a will the great bulk of the estate would pass to nonresident next of kin, and consequently be subject to a 10 per cent tax. The state claimed that the brother had been fraudulently named as sole beneficiary, for the purpose of defrauding the state of the tax which it would otherwise have obtained. At the time the will was written, Judge Martin was blind, and it was claimed that it was a physical impossibility for him to have written the will himself. But the will was sustained by the court over which Judge Martin had presided with great honor for many years.

The will of "the Great Chief Justice," John Marshall, was also a holographic will, and divided his estate, or the great bulk of it, equally between his daughter and five sons, his wife having previously died. The share of the daughter was left in trust to a nephew for her use and that of her family, and for the education of her children, not to be subject to the control of her husband or to the payment of his debts. This trust, as he says, was made "without derogating from the esteem and affection I feel for my son-in-law," and because "I have long thought that the provision intended by a parent for a daughter ought in common prudence to be secured to herself and children, so as to protect them from distress, whatever casualties may happen." The son-in-law was suggested as agent to manage his daughter's estate, and if he survived the daughter, it was recom-

mended that one half of the annual profits of the property bequeathed in trust for the daughter and her family be paid to the son-in-law for his own use.

Chief Justice Marshall's love for his wife is well known and frequently mentioned by his biographers. A bequest to one of her friends was made "as a token of my wife's gratitude for long and valuable attentions." The will also contained the following: "My beloved wife requested me while living to hold in trust for our daughter one hundred bank shares, to pay the dividends to her during my life, and to secure the same to her and her children when Providence should call me, also, from this world. In compliance with the wish of her whose sainted spirit has fled from the sufferings inflicted on her in this life, I give," etc. He had written a beautiful eulogy of his wife on the first anniversary of her death, and a copy of this was inclosed in the will for each one of his children. A thousand acres of land was given each of his grandsons named John, and if none of his sons should have a son by that name, then the land was to be given to the son named Thomas, "in token of my love for my father and veneration for his memory. If there be no son named John or Thomas, then I give the land to the eldest sons, and if no sons, to the daughters."

He had first appointed his five sons and one son-in-law as executors of the will, but fearing lest the number might produce confusion, he changed his purpose, and selected one of his sons to be sole executor, "directing that no surety shall be required of him, and allowing him $1,000 for his care and pains."

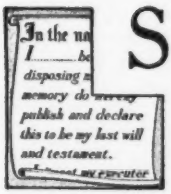
The Chief Justice owned a number of slaves, and in the first codicil to his will he makes provision for his factotum and body-guard, Robin. If he so desired he was to be emancipated, and money was given him to leave the state; but if his emancipation could not be provided for consistently with the law and the slave's own inclination, he was given the privilege of choosing his master among the sons, or he might be held, if he desired, for the daughter by the same trust as the other property had been devised to her.

The will of Grover Cleveland, recently admitted to probate in New Jersey, is written in very clear and concise language, and there is no necessity of calling in the aid of equity to construe it. After providing for the payment of debts and funeral expenses, and for the erection of an appropriate monument "only moderately expensive," he gave small personal gifts to nieces and nephews and to one or two personal friends. Then the sum of $10,000 was given to each of the two daughters and two sons, to be paid to them respectively as they shall arrive at the age of twenty-one. Until the legacies were paid or should lapse, the income was to be paid to his wife, to be applied by her to the support and education of the children, without any liability on her part to any of the children on account thereof. All the rest and residue of the property was given to "my dear wife, Frances F. Cleveland," and she was also appointed one of the executors of the will. In the clause of the will making the provision for the support of the children occurs this somewhat peculiar provision: "If, however, either of my said daughters shall, before her legacy becomes payable, cease for any reason to reside with her mother, the income arising from the investments of her legacy shall be paid to such daughter."

Whether Mr. Cleveland in making this provision had in mind differences which would cause a separation of the family, or only a possible early matrimonial adventure on the part of the daughters, is not stated.

# The Drawing of Wills

BY ALBERT S. OSBORN




SINCE the discovery of fraudulent substituted pages in the Tungsten Electric Light Patent Application a few years ago, in Washington, and the conviction of a patent examiner and patent attorney, the officials of the Patent Office have required that the various papers connected with a patent application must be fastened together with tape, both ends of which go under an attached seal. This provision, while not a perfect protection, makes it more difficult to substitute fraudulent pages.

The same danger of fraudulent substitution surrounds modern methods of preparing wills, and some provision of a similar nature would no doubt prevent many frauds. In a recent case a will devising more than five million dollars' worth of property was probated, that was written on more than a dozen separate sheets of paper, each sheet complete in itself and ending a paragraph, and the sheets were fastened with a single ordinary paper fastener at the top. In another case a will was written on one sheet of paper, with the signature of the testator at the end of the will; and a separate sheet contained only the attestation clause and the signatures of the witnesses, making it possible to write any kind of a will, and attach it to this latter sheet.

Most people are honest, but some of these practices are an open temptation to crime, and should be changed. The Patent Office regulation would be a good one, if some approved method of attaching seals could be employed. In many law offices where wills are drawn, the separate sheets of even important wills are fastened with only cheap paper fasteners, than can easily be removed, and in some important cases have been removed.

It would be a commendable practice, when possible, to write all wills on one continuous sheet of paper, with the statement at the close that only one sheet is used. The length of three sheets, or six full pages of legal cap paper, would probably contain the matter in a very large proportion of wills; and a sheet of paper equal in quantity to six pages could readily be obtained, and would not be inconvenient to handle. Stationers would no doubt find a ready market for such paper, if it was prepared and offered for sale in various lengths for this specific purpose. Lawyers could, no doubt, charge enough more for the drawing of wills to cover this additional expense, and clients would be sure to appreciate this careful attention to an important detail.

It is not often easy to substitute a page in any document,—especially after some time has elapsed,—but it can be done, and has no doubt been done successfully in many instances. If the substitution is immediate, and by the parties who made the genuine pages, no one, of course, could detect the fraud, if proper means had been employed to accomplish the end.

The opinion that prevails almost universally, that a typewritten page can be substituted successfully at any time, is erroneous, and those who have given attention to the subject know that this is a very difficult feat to accomplish; but if such an act is done at once, or within a comparatively short time, it may be difficult, or even impossible, to detect the fraud.

Many fraudulent wills are no doubt admitted to probate. Beneficiaries are many times willing to sacrifice part of a claim in order to realize promptly on the estate of a dead relative, and fraud is often thus encouraged by settlements that should not be made.

The New York legal requirements regarding witnesses to wills are perhaps as effective as any in preventing fraud, although it would be well if one at least of the required two witnesses should be a public officer of some kind. This re-

quirement would not often be a hardship, and would emphasize the fact that witnesses to such documents ought to be those whose standing in the community is of such a character that their credibility could not be successfully attacked. All kinds of nonentities are used as witnesses to wills,—servants, hired men, and dependents whose testimony regarding a document is not very forcible as evidence.

There are those who approve the practice followed in some states, of not requiring any witnesses to a will that is entirely in the writing of the testator; but the difficulty with this practice is that under these conditions a fraudulent will may contain only a half dozen words, and may be written in pencil in such a way as to make it difficult to decide definitely as to its genuineness, so that on the whole it is better to require two witnesses.

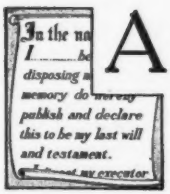
For numerous reasons it would be desirable to have wills deposited with some public officer, instead of being "found," as they many times are, in peculiar and unusual places. It would perhaps be difficult to make a regulation of this kind, but the practice could be encouraged and in a large measure established by the advice of the legal profession. This practice would be especially desirable in those cases where, for any reason, a contest may be anticipated. There is, of course, a disposition on the part of surviving friends and relatives to respect the wishes of a testator regarding the disposition of his property, even though his requests are not in legal form; and if he should himself deposit a will with a surrogate or some other proper officer, this act would in itself be sufficient answer to many possible attacks upon the document.

THERE is no difficulty in the case of a raving madman or a driveling idiot in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine.—

LORD CRANWORTH in Boyse v. Rossborough, 6 H. L. C. 45.

# The Antiquated Seal

BY HARRY SHELMIRE HOPPER
of the Philadelphia Bar




ALMOST absurd thing connected with legal business is the little piece of red, green, or blue paper or daub of sealing wax which we often place at the end of a signature to a deed, will, or other important document. It is a very small thing in size, but one to which a great deal of importance is frequently given. It is a relic of antiquity, and no plausible excuse can be invented for continuing its use.

Some of the more progressive states have practically abolished its use by legislation, which deprives it of any technical legal significance. In others, however, it is still used with all seriousness and solemnity; and an almost magical value is given to it by dignified judges, that is little less than ridiculous.

This little seal is emphatically un-American. It is one of the blind, stubborn customs and formalities inherited from the common law of England centuries ago. The tendency of modern legislators, judges, and lawyers is to simplify the form of legal documents and of legal procedure, but the seal still remains. It often happens that old established customs and methods are not abandoned quickly, and an absurd reverence is given to things long since proven burdensome and out of date. The seal is one of the customs slow to be given up. The abolition of the seal after a signature is a subject that should receive the prompt consideration of those who are endeavoring to establish uniformity of laws throughout the United States.

In those slow and deliberative states in which the seal is still revered, its presence or absence after a signature gives a document a special significance, and causes technical objections and distinctions that hinder and delay the cause of justice. How unjust it is that a fortune may be won or lost, or the title to property be subjected to prolonged and expensive litigation, because of a dispute about a seal? True it is that judges who are progressive enough to endeavor to throw off the burden of unjust precedent will, and do try to, deal liberally with the subject. A man died years ago, leaving part of his estate to another to enjoy while he lived, with the privilege of devising it, at his death, to others whom he might select, by a writing under his "hand and seal." A writing was executed so devising the property, but it was contested by others claiming the property, upon the technical ground that the paper contained no seal after the signature, and the devise was therefore void. A wise Philadelphia judge closely scrutinized the signature, and, after carefully listening to the arguments of lawyers, decided that at the end of the signature there was an extra scroll or flourish made with the pen with which the signature was made, and that this was sufficient in law to constitute a seal. The decision was technical, but it was just. A contrary decision would have been fully as technical, but it would have been manifestly unjust. A decision like this may remove some of the unjust rigor of the law, but it does not reform it altogether. Law dictionaries, text-books, and digests devote special chapters to the subject of the seal, its definition, history, and purpose; but in this twentieth century—a century of progress—we are governing everyday life and business on a common-sense, practical basis, and trimming off the frills and useless ornaments that no longer help us to accomplish any good purpose. Historical reasons and ancient precedents must give way to American clear-headedness and practical methods. Legal authorities go back to the books of Lord Coke, to get a correct definition of a seal. Prolonged arguments and discussions have taken place in times past as to what kind of a device constituted a seal in the eyes of the law. Blackstone has said that its antiquity goes back to

the ancient Jews and Persians; and he quotes a transaction from the Bible, in the book of Jeremiah, describing the "sealing" of a transfer of land. The same author said that in Saxon times seals were not much used in England. Learning or ordinary education was not general, and many people could not write their names. Those who could not write made a mark or a seal as their signature, and a custom came into use, even by those who could write, of affixing the sign of the cross, with their signature. The practice of sealing continued when people became more learned and could write their names. At the time of the conquest, the Norman lords introduced waxen seals. Then followed various designs of individual seals, and finger rings were used to make impressions in a waxen seal. It was long the law that a seal was the prime requisite of a deed, regardless of the signing of the name. The definition of a legal seal, as laid down in the books, is both interesting and amusing, but in this practical and progressive age the subject seems almost silly and childish. Various substances and designs have come before courts for judgment as to whether the particular substance or design was a seal in legal signification and effect. The most familiar seals are those made of circular pieces of colored paper with saw-like edges. The most formal seal consists of a circle of hot sealing wax dropped upon the paper, and a design or initial impressed upon it. Combinations of both wax and paper have also been used; also pieces of red tape or green ribbon have been run through slits in a parchment deed, and a wax or paper seal attached. In this connection, a court once solemnly decided that a piece of ribbon so attached, without a wax or paper seal or wafer attached, was not a legal seal.

When a lawyer wants to have full force given to a document which he offers in evidence, he draws the attention of the court to the fact that it has been duly "sealed," and therefore cannot be questioned, because the seal implies that a consideration, something of value, has been received by the party who has signed it. Such a statement always makes a profound impression upon the presiding judge, who, in turn, proceeds to make a similar impression upon the jury. Every person taking part in the proceeding, however, knows, as a matter of truth, that the affixing of the seal has been a most perfunctory part of the executing of the deed, and really does not indicate whether a consideration has passed or not. But the ancient traditions must be kept up and followed, whether just or not.

Instances occur in which agreements are prepared to be signed by business men. Their respective attorneys examine the papers. One does not think they are as binding upon the other party as they might be. It is then suggested that an additional clamp or band be placed around the agreement by attaching seals to the signatures. The seals are duly affixed, and all parties are satisfied that no question of a valuable consideration having passed can now be raised. The effect is truly magical, but it is a convenient fiction and extremely arbitrary.

This legal reverence for the seal is a bowing down to a fetish, without excuse or justification, in this enlightened age. No reason exists for continuing it. It is contrary to the modern spirit of simplicity, conciseness, and clearness in all business, commercial or legal, in court or out.

It has been asserted that the act of affixing a seal to a document indicates that the execution of it was attended with deliberation and solemnity, and that the parties to it were duly impressed with the importance of the business they were reducing to writing. As a matter of fact, however, there is no solemnity whatever about a seal, upon the human mind in these days. A man either does or does not know what he is signing, and the presence of a seal does not affect his consciousness. A scroll of ink made with pen or type, or a piece of gaudy paper, or a lump of wax, may amuse him, but none of these things produce any feeling akin to solemnity in him. Neither is there deliberation. He does not pause to affix the seal. The scrivener has already done that for him. And where one seal has appeared beside several signa-

tures, it has been judicially decided that one person may adopt the seal already used by another.

Some authors of legal treatises, some judges, some lawyers, some legislators, frankly admit that the theoretical solemnity of "sealing" is totally unsuited to modern business methods; but when they get together to frame laws, they do not have the courage to effect the passage of a law to abolish the seal. Sometimes the opposition of one or two fossilized men, who see good only in things as they are and have been, will prevail against the purposes of progressive ones. These remarks apply, of course, only to those states in which the silly seal still commands respect in dignified courts of justice, and not to those in which the ridiculous talisman has been turned out of court.

Some years ago a bill was introduced into the Pennsylvania legislature to abolish the distinction between sealed and unsealed instruments of writing, but it was put to sleep in a committee and never more heard of. It was published in a legal journal, and brought forth some debate in print, and it was surprising that some supposedly wide awake lawyers should oppose its passage.

To adhere to the use of the seal is simply a stubborn desire to wear old clothes without regard to the fact that they are out of style, worn out, and require frequent patching. We recently ridiculed people who walked the streets, clad in the costume of ancient Greece, but we adhere to just as amusing a custom and one still more absurd, when we insist upon using the antiquated seal.

A variety of subjects are being suggested for consideration in making the legislation uniform throughout the United States. Surely one of the simplest to deal with is the ancient seal. Let us discard it altogether, and hereafter think of it as something of historic interest only, as we now do of the customs and usages of the feudal system. The time and the opportunity are ready, and it is only action that is needed. Let us have uniform laws abolishing the seal. Such action will lessen litigation, and this is just as much the duty of lawyers and legislators as it is the duty of health officers and physicians to prevent disease. Delay in legal proceedings will be lessened by taking away opportunities for technical pleas, and honesty will be encouraged by depriving the dishonest of tricks to avoid their just obligation.

THE right is conceded by common law throughout civilized countries that a man should dispose of his property as he sees fit. A great American judge has said that old age is solitary, and often the only way in which an old man can command the attention to his infirmities that they merit is this right of disposition.—

WIRT DEXTER, in the Ward will case.

# Oddities of Testators

The Irish gentleman, says Tit-Bits, who has left $5,000 to a religious house on condition that his wife enters it and spends the rest of her life in prayer is another example of the quaint methods by which the dead sometimes endeavor to control the living.

It was a blunt farmer who drew up his will leaving $500 to his widow. When the lawyer reminded him that some distinction should be made in case the lady married again, he doubled the sum, with the remark that "him as gets her'll deserve it."

It was a wealthy German who, fifteen years ago, bequeathed his property to his six nephews and six nieces, on the sole condition that each of the nephews married a woman named Antoine and each niece married a man named Anton. The first born of each marriage was to be named Anton or Antoine, according to sex. Each marriage was also to take place on one of St. Anthony's days. What happened to the nephews and nieces is "wropt in misery" in the office of the German registrar general.

An exchange states that the winding up of the estate of the widow of a former French consul general at Jerusalem, an old lady, who died two years ago, leaving property valued at $6,000,000, will be no easy matter. The deceased seems to have been incessantly occupied in making wills and adding codicils. The last codicil discovered, which is dated August 16, 1907, "confirms the two last testaments," revoking all others. But the lady drew up in all fifteen wills. Nine of the number are plainly revoked by the above codicil, but six others all bear the same date, May 9, 1904.

Two of these appear to be the "last testaments" referred to in the codicil, as no later wills have so far been found. But which two of the six are the latest?

The lady evidently wrote them at different hours of the same day, but there is no indication in any of them of the precise moment. The point is an important one, as by three of the six wills, but not by the others, a female relative of the deceased inherits large sums, which the universal legatee may or may not have to pay.

The courts are now engaged in an attempt to determine by "internal evidence" which of the wills most probably expressed the latest wishes of the deceased, French jurisprudence allowing in such matters considerable latitude.

Without any warning a Washington boy of eight, says the Cleveland Plain Dealer, has been brought face to face with the fact that life is frequently a very hard proposition. The boy is to receive an estate, value not named, under certain conditions. These conditions are severe enough to leave the fate of the estate, value not named, in considerable doubt. The boy must graduate from a public high school before he is fourteen; he must win a college degree before he is eighteen; he must study law six months at Oxford; he must graduate from West Point. After receiving his commission he must resign and complete his law studies and then practise the profession. All this he must accomplish by the time he is twenty-eight.

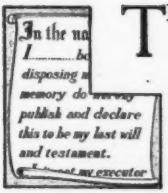
Incidentally he is to acquire proficiency in manual training, in dancing and in music, and is to beware of women. If he fails to meet these conditions he is to forfeit all claim to the property. Probably the boy is too young to appreciate the magnitude of these tasks, but it looks as if the coming twenty years would prove an exceedingly busy period for him,—with the shadow of failure always darkening the rugged pathway.

The man who made this peculiar will and imposed these exacting conditions may have had an exalted view of the importance of a thorough education, but the wisdom of his method and the value of his theory can only be told by the youth himself,—this hapless hero of a gigantic educational plot.

Later on it may occur to the young man to seriously consider the value of the estate as compared with the labor and sacrifices of the task.

# The Importance of the Last Will and Testament

BY VIRGIL M. HARRIS
Trust Officer of the Mercantile Trust Company of St. Louis




THE North American Review in a recent editorial said: "The writing of a will is a serious and formal matter, and into one a man puts his deliberate and well-reflected intentions. This makes a will stupendously revealing, and to read one over is to come very close to the spirit of the man who wrote: to know his treasures, to understand his feeling toward men, and to measure his fitness for adventures among seraphic and angelic beings. The words a man desires to have read when he lies dumb, the gifts he leaves, the grace with which he gives,—all these lay bare the spirit, the heart of disposition, as few other things can. For a will is that which is to live after one, and it is written knowing that no wound inflicted can be remedied, no neglect repaired. How egotism, or miserliness, or conceit, or self-satisfaction can shine out in a will! How little exalting it is in most cases to read wills; and how often they turn us back to the authoritative statement that it is easier for a camel to pass through the eye of a needle!"

The power to dispose of property by will does not appear in any of the primitive systems of law. In the year 1902, the French government sent out a commission to make archæological investigations in Persia. At the city of Susa, they uncovered a stone on which were written the laws of Hammurabi, who reigned twenty-three hundred years before Christ, or one thousand years before Moses received the Ten Commandments on Mount Sinai. This Code has been translated by Professor Robert Francis Harper, of the Chicago University, and furnishes one of the most remarkable and readable books which has ever come into my hands; it treats of the laws of money, banking, inheritance, weights and measures, divorce, dower, crimes, and, singularly enough, some of its provisions are present-day law. There is, however, no mention of wills.

In fact, the will, as we know it, is a Roman invention. Free liberty of disposition by will is by no means universal at this time. Complete freedom in this respect is the exception, rather than the rule. Homesteads generally, estates of dower and curtesy frequently, as well as other portions of an estate, are not the subject of devise or bequest.

Lord Coke says, "Wills, and the construction of them, do more perplex a man than any other learning,"—and Lord Coke was right; nor has the perplexity which he observed decreased since his time.

There never was a fitter application of Pope's line, "A little learning is a dangerous thing," than in the preparation of wills; and it is a most astonishing fact that men who have lived prudently, who have been conservative and successful in business, who have accumulated large wealth, who have been buffeted by every wave of misfortune, will attempt, by their own hands or through incompetent agents, to write their wills. It is always a hazardous undertaking, unless the instrument is of the simplest character. If one's child is sick, a doctor is called; if a man's roof is defective, a carpenter is sent for; if a horse throws a shoe, the animal goes to the blacksmith; yet, when it comes to the making of a will, perhaps the most solemn and consequential act of a man's life, the testator takes his pen, and frequently, without aid or counsel, does that which experience and our court records fully demonstrate he is incompetent to do.

Mr. Daniel S. Remsen, of New York, who is one of the highest authorities in

America at this time, on the preparation of wills, says that fully 50 per cent of wills contain some obscurity or omission. With this statement I find myself in complete accord. I believe that nearly half the wills written are open to attack and a large portion of them fatally defective. I have never seen more than a dozen perfectly drawn wills, gauged by the standards of perfect clearness, precision, and legality.

As stated by Mr. Remsen, "A will is an *ex parte* document, and is written from one point of view; it is the expression of the wishes of the testator regarding the work of a lifetime; upon its legality, depends the future happiness and welfare of the persons and objects most dear to the testator; and, whether viewed from a property or a family standpoint, it is often the most important document a man of large or small means is ever called upon to prepare."

Unfortunately the idea prevails that a will is a very simple instrument to prepare. Nothing in business life can be further from the truth; on the contrary, a will may be, and usually is, the most intricate of all legal documents. This is always true where there are gifts or devises depending upon contingencies, or where trusts are created. A deed or a contract may be changed; not so with a will, after the death of the maker. Foresight in its preparation is imperative.

There is a well-marked legal distinction between the words, "heirs, devisees, legatees, distributees, and legal representatives." Each of these terms has a clear and well-defined signification. One who has the preparation of wills must deal with the law against perpetuities. An estate cannot be tied up, under our law, for a longer period than "a life or lives in being and twenty-one years thereafter." This is not only the law of Missouri, but the general law of the land. The law of dower and curtesy is by no means simple. The law of vested and contingent remainders is a most intricate subject, and requires years of legal study to comprehend, and cannot be simplified. The creation of life estates and trusts demands the most careful inquiry. There are spendthrift provisions which are easier to break, than to prepare. The statute of uses cuts an important figure in testaments. The provisions with reference to the powers of executors and trustees are very comprehensive, and must be framed with great care and precision. The subject of joint tenants by the entirety frequently requires the most profound consideration in the interpretation of wills.

I recently saw a decision of one of the higher courts of Missouri, where a resident of Pike county gave a large sum of money by will to his wife "to hold, possess, and enjoy during her natural life;" at her death the fund was to go to Westminster College, at Fulton, Missouri. The widow promptly set about to enjoy the fund by spending it; the court held, and properly, that she had a right to do so, and that Westminster College got nothing. The will was improperly drawn. Had it been stated that she should "enjoy the income," a different result would have followed.

A few months ago I saw a will in which an estate of $1,000,000 was disposed of: the testator, under the will, divided the estate into ten parts, but overlooked the disposition of one of these parts.

There came under my observation, not long ago, a will drawn in Michigan: the testator owned property in Michigan and also in Missouri and South Carolina. The will had but two witnesses: it was effective in Michigan and Missouri, but in South Carolina, where three witnesses are required, it was inoperative.

Within the last few days, I examined the will of one of Missouri's most gifted and eloquent Senators, now deceased; an ample provision for his wife was followed by this clause: "The acceptance by my wife of the provisions for her benefit, contained in this will, shall bar all claim by her for dower in any real estate heretofore or hereafter conveyed by me to anyone." This attempted exclusion of the wife's dower is well-nigh meaningless: his intent was to preclude her right of dower in any real estate owned by him at the time of his death; but he said, "conveyed by me to anyone;" all real estate possessed by him at the time of his death was subject to dower, and not excluded.

A will was recently presented to me where the testator left a large estate;—one third to his wife, one third to a son, and one third to a grandson: the wife predeceased the testator. The question arose as to what became of the one third given to the wife.

If I make a bequest or devise to a "child, grandchild, or other relative," the property passes to the lineal descendants of these, in the event the legatee or devisee dies before I do, and it is otherwise as to all other persons: as to them, the devise or gift lapses; even the children of stepchildren would not take under these conditions.

It is said, "A will has no brother," meaning that no two are alike. The general rules of construction are too numerous and complex for a discussion here. Technical words are presumed to be used in their technical sense, unless a clear intention to use them in another is apparent from the context. Our courts are always busy in an endeavor to ascertain the intentions of testators. The truth is, few men write accurately and precisely. The proper use and selection of words in the construction of wills is a very grave duty.

A general outline of the framework of a will may be stated as follows:

(a) A will should revoke all former wills: if this is not done, the will may be taken in connection with others. If the testator is unmarried, he should state that fact. His statement does not make it true, but it may serve a very excellent purpose in thwarting the claims of designing persons.

(b) There should be a provision for funeral expenses, and suggestions with regard to a burial place and a monument.

(c) Provision for the payment of debts should be made, and the executor given full power to pay debts and to sell and convey any portion of the estate.

(d) Provision should be made for small bequests to relatives and friends, and for charitable purposes.

(e) Suitable provision for wife and children should be made.

(f) Provision should be made for trust features; these are operative only after the administration is ended.

(g) There should be a residuary clause which catches up and disposes of any portion of the estate not already disposed of, including lapsed legacies and devises.

(h) The executor should be named.

(i) The date and signature.

(j) Finally, the attestation.

To me it is incomprehensible that nine men out of ten who make their wills seek to hamper and restrain the remarriage of their widows; neither the age of the husband nor of the wife seems to deter a testator in this direction: on the other hand, I have never seen such a restriction in the will of a married woman; and this spirit of benevolence and trust, in a comparative view of the sexes, is, I believe, quite as marked in other directions, notwithstanding the lines of Saxe, which run:

> "Men dying make their wills,
> But women escape a work so sad;
> Why should they make what, all their lives,
> The gentle dames have had."

A man should make his will when he is in a normal and healthy condition. A sick man or a very aged man, as a rule, is not in a condition to judge fairly of the affairs of human life. He is apt to be unconsciously influenced and misled, or even coerced. He may be diverted from the natural channels of affection, right, and justice. Frequently the result is disastrous litigation, the breaking of domestic ties, and the exposure of family skeletons.

Sometime ago I wrote a will for an aged man, wherein he left considerable money to a friend, who, he told me, lived in a town in Ireland. The testator was on his deathbed. The beneficiary could never be found, and I doubt if he had a real existence.

No lawyer should be asked to write a will cheaply or hastily. The testator who has no proper appreciation of this service, and who drives a bargain for $10, for that which is worth $100 or more, usually gets about what he pays for.

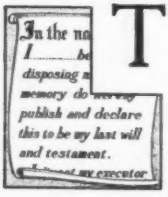
Witnesses to wills should never be interested in the instrument. If the testator is aged, the witnesses should be those well acquainted with him; in fact, this is always a good rule, whether the tes-

tator be old or young: this precaution may prevent much trouble and complication, and it has the sanction of our highest courts.

In making provision for children in wills, the corpus or principal fund is not infrequently to be turned over to them on arriving at legal age. According to my observation, the age of thirty is much preferable. It is not possible for any young man or woman at the end of minority to be possessed of much wisdom with reference to the care of property. Worldly knowledge is not congenital, and we have high authority that "in youth and beauty wisdom is but rare."

I recommend that of each will there be made a copy; the original should be placed in one safe place, and the copy in another. This very much lessens the chance of its being destroyed or falling into bad hands.

# Oldest of Known Wills


In the na
I ..... be
disposing m
memory do hereby
publish and declare
this to be my last will
and testament.
I appoint my executor

THE discovery of the earliest known will was an event which possessed an interest for others besides lawyers, and there seems no reason to question either the authenticity or antiquity of the unique document which Mr. Flinders Petrie unearthed a few years ago at Kahun, or, as the town was known 4,500 years ago, Illahun. The document is so curiously modern in form that it might almost be granted probate to-day. But, in any case, it may be assumed that it marks one of the earliest epochs of legal history, and curiously illustrates the continuity of legal methods. The value socially, legally, and historically, of a will that dates back to patriarchal times, is evident.

It consists of a settlement made by one Sekhenren in the year 44, second month of Pert, day 19,—that is, it is estimated, the 44th of Amenemhat III., or 2,550 B. C., in favor of his brother, a priest of Osiris, of all his property and goods; and of another document, which bears date from the time of Amenemhat IV., or 2,548 B. C. This latter instrument is, in form, nothing more nor less than a will, by which, in phraseology that might well be used to-day, the testator settles upon his wife, Teta, all the property given him by his brother, for life, but forbids in categorical terms to pull down the houses "which my brother built for me," although it empowers her to give them to any of her children that she pleases. A "lieutenant" Siou is to act as guardian of the infant children.

This remarkable instrument is witnessed by two scribes, with an attestation clause that might almost have been drafted yesterday. The papyrus is a valuable contribution to the study of ancient law, and shows, with a graphic realism, what a pitch of civilization the ancient Egyptians had reached,—at least from a lawyer's point of view. It has hitherto been believed that, in the infancy of the human race, wills were practically unknown. There probably never was a time when testaments, in some form or other, did not exist; but, in the earliest ages, it has so far been assumed that they were never written, but were nuncupatory, or delivered orally, probably at the deathbed of the testator. Among the Hindus to this day the law of succession hinges upon the due solemnization of fixed ceremonies at the dead man's funeral, not upon any written will. And it is because early wills were verbal only that their history is so obscure. It has been asserted that among the barbarian races the bare conception of a will was unknown; that we must search for the infancy of testamentary dispositions in the early Roman law. Indeed, until the ecclesiastical power assumed the prerogative of intervening at every break in the succession of the family, wills did not come into vogue in the West. But Mr. Petrie's papyrus seems to show that the system of settlement or disposition by deed or will was long antecedently practised in the East.—Irish Law Times, from the Standard.

# The Editor's Comments

Current Topics of Interest to Lawyers.

THE LAWYERS MAGAZINE

Vol. 17 DECEMBER, 1910 No. 7

Established 1894.

¶ Edited, printed and published monthly, by The Lawyers Co-operative Publishing Company: President, W. B. Hale; Vice-President, J. B. Bryan; Secretary, B. A. Rich; Treasurer, W. H. Briggs.

¶ Office and plant: Aqueduct Building, Rochester, New York.

¶ TERMS:—Subscription price $1 a year 10 cents a copy. Advertising rates on application. Forms close 15th of Month preceding date of issue.

¶ EDITORIAL POLICY:—It is the purpose of CASE AND COMMENT to voice the highest legal and ethical conceptions of the times; to act as a vehicle for the dissemination and interchange of the best thought of the members of the legal profession; to be both helpful and entertaining,—serving the attorney both in his work and in his hours of relaxation.

Edited by Asa W. Russell

## *Death and Sociology.*

ALTHOUGH agitation for the abolition of the death penalty," says the Boston Transcript, "continues year after year in a number of states in this country, from time to time there emanate suggestions from sociologists, more or less eminent, that it be more extensively employed not merely as a penalty, but as a means of ridding society of its burdens and its waste. One of the latest advocates of this plan is Judge Amidon, of the United States district court for North Dakota. He has openly recommended the painless execution of professional criminals and the hopelessly insane. He is not the first modern jurist of standing to express views of that general character. Cold blooded as the proposition seems, those who have advanced it have generally been regarded as merciful men even in their judicial capacity. Certain physicians also, of high professional standing, have taken similar ground."

"An habitual, incorrigible enemy of society should be solemnly adjudged to be put to death," said Judge George C. Holt, of the United States district court of New York, in an address before the Wisconsin State Bar Association. Continuing, Judge Holt said: "I would give him a fair trial. I would require proof that he had been an habitual criminal for a long term of years. I would give him all opportunity to make a full defense, and if finally it were established by clear proof that the man was one of those—numbers of whom exist in modern society—whose nature has been degraded by a life of undeviating wickedness into that of a wild beast, incapable of any substantial improvement or alteration, such a man, in my opinion, should be solemnly adjudged to be put to death. But if, in view of the squeamish sentimentality of the age, such a course be deemed impracticable, I should shut him up for life where he could do no more evil to society."

Judge Holt, comments the Terre Haute Times, may consider it "squeamish sentimentality" because society is not willing to begin a ruthless killing of habitual criminals, but the opinion of the most learned penologists of the world is against the jurist. Society is now beginning to learn, and to admit, that criminality and degeneracy are often the results of an undesired, overworked, poorly housed, or alcoholized, and sometimes diseased, parentage. Since the habitual criminal was condemned at birth in many cases, thoughtful and kindly people op-

pose such drastic action as that proposed by Judge Holt. The argument in favor of the proposition seems to be, says the Transcript, that so few professional criminals reform that the chances of such a result are hardly worth considering, and that in the case of the hopelessly insane it would be a mercy to put them out of their misery. These may be premises not easy to disprove; yet it sometimes happens that the apparently totally depraved man does develop a conscience, and becomes a useful citizen, and those pronounced hopelessly insane or hopelessly afflicted with any other malady do sometimes confound the experts, and return to the normal activities and pleasures of life. Only that infallibility of judgment which will probably never be attained would warrant society in even considering this proposed remedy for its ills and burdens.

Such an extreme suggestion can hardly be regarded as progressive. The American Indians employed a somewhat similar method of ridding their ranks of the useless and burdensome members, either by desertion or in some cases by the tomahawk. While the economic value of such a disposition of social wastrel might be apparent, the moral effect would be disastrous.

We cannot ignore the brotherhood of man, which is a profoundly true principle, in spite of the widespread growth of degeneracy. None of us can say with Cain, "Am I my brother's keeper?" We have a moral duty cast upon us to help the weak, the fallen, and even the depraved. Indeed, the adoption of views like those of Judge Amidon or Judge Holt would probably end in sapping civilization itself and bringing about a recrudescence of barbarism.

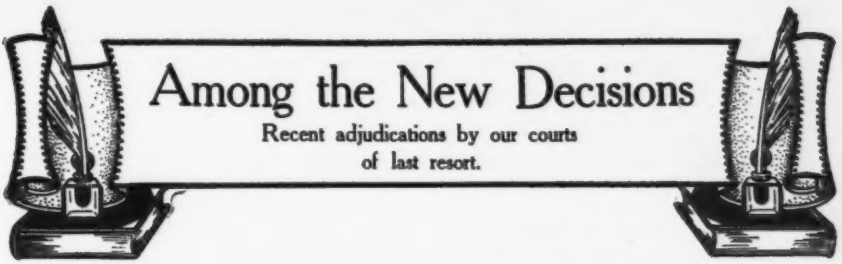
## *Leading Lawyers for Penniless Prisoners.*

JUDGE Scanlan, presiding over a criminal court in Chicago, has invented a new method of assigning lawyers to defend persons arraigned before him who have no money with which to retain counsel of their own choosing. Hitherto it has been the custom to assign to their defense inexperienced barristers of little practice. "The young lawyers," as one Chicago newspaper puts it, "got the experience, while their clients usually got an indeterminate sentence to Joliet."

Judge Scanlan's idea appears to be that no lawyer, however prominent or busy, should be exempt from the necessity of devoting his talents to the defense of destitute persons; and the plan he has adopted in making assignments is to take the Chicago lawyers' directory, open it at random, and select the name of the first prominent lawyer he notices. On his first trial of this method he named four of the best known practitioners in the city to give their time and legal attainments to the defense of indigent clients.

We assume that the lawyers so chosen will accept their assignments good naturedly and render their unexpected clients the best service of which they are capable. A year or two ago certain eminent lawyers in New York set an excellent example by volunteering for appointments to such cases, but such examples are very rare.

"By all means," observed the Record-Herald, "let competent and capable lawyers be called upon occasionally to defend pauper prisoners. Such social service is good for their souls, good for the prisoners, and good for the criminal law."




**Adverse possession—religious society.**—The authorities are all to the effect that the trustees of a religious society may acquire title to property by adverse possession. This rule has been upheld, or at least recognized, in many cases. It was applied in the recent West Virginia case of Deepwater R. Co. v. Honaker, 66 S. E. 104, annotated in 27 L.R.A.(N.S.) 388, holding that church trustees, like other persons, may, under a deed as color of title, acquire good title to land by adverse possession, though the deed be the deed of a married woman, purporting to convey her separate estate, but void for want of privy examination; and they will acquire such title as the deed purports to convey.

**Assignment—action for injuries.**—Although the cases are not entirely harmonious as to the effect of a statute which makes a cause of action survive, to make it also assignable, yet the majority of the cases agree with the recent Mississippi case of Wells v. Edwards Hotel & City R. Co. 50 So. 628, also reported with full presentation of the authorities on the subject in 27 L.R.A.(N.S.) 404, holding that a cause of action for personal injuries may be assigned where by statute it would survive the death of the person injured.

**Attachment—nonresident—Federal soldier—military reservation.**—A question not previously passed upon by the courts was presented for adjudication in the recent Virginia case of Phoebus v. Byrum, 67 S. E. 349, 27 L.R.A.(N.S.) 436, holding that a nonresident who, as an enlisted soldier of the United States, is stationed upon a tract of land which has been secured by the Federal government within a state for military purposes, does not become a citizen of such state, so as to defeat the right of a creditor to issue an attachment against him as a nonresident, although state process may be served within the reservation.

**Attorney—lien—percentage of recovery.**—That no equitable lien upon the fund arises in favor of an attorney who undertakes to protect his client's interest under a will, for a percentage of the value of the property recovered, is determined in De Winter v. Thomas, 34 App. D. C. 80, annotated in 27 L.R.A.(N.S.) 634.

The distinction made in De Winter v. Thomas seems to be that if the agreement is for a certain fee or percentage to be paid out of the fund recovered, a lien is created; while if it is merely for a sum equal to a certain percentage of the fund recovered, or for a certain amount in case of recovery, the contract is merely personal between the attorney and client, and no lien on the fund recovered is created. That this distinction is extremely shadowy when applied to actual cases will become apparent upon examination of the cases of Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623, and Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92, affirming 127 Fed. 418, which are set out quite fully in De Winter v. Thomas.

**Bigamy—belief in termination of former marriage—defense.**—In a prosecution for bigamy, when it appears that the first wife is still living, it is held erroneous in Baker v. State, 86 Neb. 775, 126 N. W. 300, 27 L.R.A.(N.S.) 1097, to exclude evidence offered by defendant tending to show that, prior to his second marriage, he was credibly informed that his first wife had obtained a divorce, and that he had sufficient reason to believe and did believe the information so received, and relied thereon in good faith.

While the courts are agreed that a mis-

take of law is no defense, they differ in opinion as to whether a mistake of fact may be considered as a defense. The point upon which the answer to the latter question must turn is whether an actual intent to violate the law is an element of the crime of bigamy. Since the statutes defining the offense do not ordinarily, if ever, contain any reference to the mental element, the legislative intention is left to deduction, thereby occasioning the differences of opinion which exist.

**Carriers—free transportation—stockholders' meetings.**—An interesting question not previously before the courts is determined in Emerson v. Boston & Maine R. Co. 75 N. H. 427, 27 L.R.A.(N.S.) 331, 75 Atl. 529, holding that transportation of stockholders of a railroad company to and from their annual meetings, without charge, in accordance with the provisions of a lease of the road, is not free, within the meaning of a statute enacted after the execution of the lease, forbidding, under penalty, railroad companies to give free transportation.

**Criminal law—inspection of minutes of grand jury.**—A person charged with crime is held in State v. Rhoads, 81 Ohio St. 397, 91 N. E. 186, not entitled, before or at the time of trial, to the minutes of the evidence taken before the grand jury, on which the indictment was found against him, nor to an inspection of a transcript of such evidence; and it is error for the court to order the prosecuting attorney to deliver said minutes, or a transcript of said evidence so taken, to the defendant or his counsel, or to order the prosecuting attorney to permit either of them to make an inspection thereof.

As appears by the note which accompanies this case, in 27 L.R.A.(N.S.) 558, none of the cases upon this question appear to have gone to the extent of holding that the trial court committed error in refusing inspection. On the other hand, no appellate court appears to have been called upon to go to the other extreme and hold, as in the above reported case, that it was error for the trial court to permit inspection. And while the courts have not always agreed as to what particular facts must be established by an accused before an inspection should be granted, it seems safe to say that none of them have positively asserted that the right should always be denied no matter what the circumstances.

A careful reading of the opinion in the reported case discloses that it was merely held that it was error to grant defendant's motion, in order that the inspection might be made use of on the trial, upon his plea of not guilty.

**Municipal corporations—physicians—forbidding advertisement.**—That a municipal corporation cannot, under charter authority to regulate doctors and provide for the general welfare, forbid the publication of advertisements of relief for venereal and private diseases, is held in the recent Missouri case of St. Louis v. King, 126 S. W. 495, 27 L.R.A.(N.S.) 608, which seems to be a case of first impression.

**Municipal corporation—sidewalk—roller skating.**—The liability of a municipality for an injury to a child using roller skates on the sidewalk was considered, apparently for the first time, in Collins v. Philadelphia, 227 Pa. 121, 27 L.R.A. (N.S.) 909, 75 Atl. 1028, holding that while a municipal corporation is under no obligation to keep its sidewalks safe for roller skating, yet the fact that a child was engaged in roller skating when injured by catching its foot in a hole in a sidewalk will not prevent its holding the municipality liable for the injury, if the hole was of such a size and so located as to render the walk unsafe for pedestrians, and had existed for such a length of time as to charge the municipality with notice of it.

**Office—county treasurer—eligibility of woman.**—There is considerable conflict among the authorities as to the right of women to hold office, and there is a marked tendency in the modern statutes to enlarge the rights of women in this respect.

In the recent Nebraska case of State ex rel. Jordan v. Quible, 125 N. W. 619, it was contended that, to be eligible to hold the office of county treasurer, the person must be a qualified elector, but the court held that, as neither the Consti-

tution nor the statutes declared that women were ineligible to hold the office of county treasurer, and as there were no constitutional or statutory provisions inconsistent with their right to hold the office, the court would follow the common law, which it declared permitted women to hold offices administrative in character, the duties of which they were competent to discharge.

The report of this case in 27 L.R.A. (N.S.) 531, is accompanied by a note discussing the recent cases upon the right of women to hold office, the earlier decisions having been presented in a note to the case of State ex rel. Crow v. Hostetter, 38 L.R.A. 208.

**Poor—medical relief—possession of resources.**—The right to use public funds to relieve persons not entirely without means of their own is considered in Coffeen v. Preble, 142 Wis. 183, 125 N. W. 954, annotated in 27 L.R.A.(N.S.) 1079, holding that the jury may find that a town may rightfully furnish medical aid to a family all of whom are bedridden with typhoid fever, under a statute permitting it to relieve all poor and indigent persons whenever they shall stand in need thereof, although the family owns a slight equity in a small piece of property, and has some credit at a grocery, and a few dollars in money.

"Whether the person is entitled to relief," observes the court, "must depend upon the particular facts of the case. The comparative lack of property, the severity of the affliction, the helplessness of the person applying for relief, the necessity for immediate action, and the availability of his property for conversion into cash or as a basis for credit, as well as the situation of the afflicted with respect to prosperous and willing friends and relatives,—are all to be considered."

**Taxes—inspection of private books.**—The question whether a statutory provision for the inspection by a taxing officer of private books and papers violates the constitutional enactment against self-incrimination was presented, apparently for the first time, in People ex rel. Ferguson v. Reardon, 197 N. Y. 236, 90 N. E. 829, 27 L.R.A.(N.S.) 141, holding that the legislature cannot require a stockbroker to permit an examination of his private books and papers to enable a tax officer to determine whether or not a record which he is, under penalty, required to keep, of stock transfers to furnish evidence for their taxation, has been correctly kept, where the Constitution forbids compelling one in a criminal case to be a witness against himself.

**Wharf—injury to—liability of shipowner.**—There appears to be little authority upon the question of the liability for injury done to a wharf by a vessel lying thereat during a storm. The few cases which have discussed the question are collated in a note appended in 27 L.R.A.(N.S.) 312, to the case of Vincent v. Lake Erie Transportation Co., also reported in 109 Minn. 456, 124 N. W. 221, holding that where, under stress of weather, a master, for the purpose of preserving his vessel, maintains her moorings to a dock after the full discharge of the vessel's cargo, and the dock is damaged by the striking and pounding of the vessel, the dock owner may recover from the shipowner for the injury sustained, although prudent seamanship required the master to follow the course pursued.

**Wills—lost or destroyed—probate.**—The cases are not harmonious upon the question whether part of a lost or destroyed will can be admitted to probate, or whether there must be complete proof of all its contents. In some states there are statutes permitting and regulating the proof of lost wills, which require the whole will to be established before it can be admitted to probate; of course, in these states, proof of a portion only would be sufficient.

The majority of the cases sustain the doctrine announced in Re Patterson, 155 Cal. 626, 102 Pac. 941, also reported with note collating the earlier decisions, in 26 L.R.A.(N.S.) 654, holding that provisions of a destroyed will which was clearly and distinctly proven by the requisite number of witnesses cannot be denied probate merely because other provisions of the will cannot be established, if they would be entirely unaffected by the

latter provisions, where the statute provides that no will shall be proved as a lost or destroyed will unless its provisions are clearly and distinctly proved by at least two credible witnesses.

**Will—joint and mutual—revocation.**—There is much confusion and apparent conflict among the cases upon the question of the revocability of a mutual or conjoint will by one of the makers after the death, or without the consent, of the other. The general principle, however, seems to be that such an instrument, as a testamentary instrument, may be revoked by either maker, so far as his property is concerned, without the consent of the other, and therefore an express or implied covenant against revocation will not prevent the probate of a later will executed by one of the parties; but a court of equity may in a proper case give effect to the instrument as a contract, in the same way that equity may give practical effect to an agreement to make, or not revoke, an individual will. This distinction serves in a large measure to reconcile apparently conflicting cases.

The recent case of Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216, annotated in 27 L.R.A.(N.S.) 508, declares that a will executed jointly by husband and wife, in which each devises his or her property to the other for life with remainder over, cannot be revoked by one after the death of the other. But while this decision lays down the proposition broadly that a mutual will cannot be revoked by the survivor, the only point which the court had to decide, to arrive at its conclusion, was that the survivor could not, by any act on his part inconsistent with the mutual will, affect or impair the rights of the remaindermen or residuary legatees.

**Will—election of spouse to take against—effec.**—There is no dissent from the proposition that the election of one spouse to take, as against the will of the other, the interest which the law gives such surviving spouse in the decedent's estate, will neither render such estate intestate property, for the purpose of determining the rights of the survivor, nor affect the other testamentary dispositions made by the decedent, except as the exercise of the paramount right may cause a diminution of the remaining part of the estate.

The recent case of Pittman v. Pittman, 81 Kan. 643, 107 Pac. 235, annotated in 27 L.R.A.(N.S.) 602, determines that where a widow, without regard to the provisions of the will of her deceased husband, elects to take under the law of descents and distributions, such election does not render the will inoperative. As between other persons, the will will be enforced as nearly in accordance with the intention of the testator as it can be.

**Witnesses—privilege—physician's statement to patient.**—Conceding that statements or communications made by a patient to his physician are confidential and privileged, it would seem that any statement of fact made by the physician to the patient, based upon such privileged communications, or based upon information acquired while acting in the confidential relation of physician, would be equally privileged.

This view is confirmed by the recent Nebraska case of Bryant v. Modern Woodmen, 125 N. W. 621, holding that a statement of fact or opinion expressed by a physician to a patient in the course of a professional visit, based upon a relation of facts by the patient, or upon a physical examination by the physician, is a part of the same transaction, and is as much privileged as the facts or statements of the patient on which it is based.

The case law bearing on the question is collated in a note accompanying the report of the case, in 27 L.R.A.(N.S.) 326.

# The Readers' Comments

Who shall decide when doctors disagree,
And soundest casuists doubt, like you and me.—Pope.

[Note.—The discussion of Mr. Roosevelt's criticism of the United States Supreme Court, which was invited in the October number of Case and Comment and which closes with this issue, has attracted wide-spread attention among the legal profession. Lawyers of our eastern and western seaboards and from many of the interior states have expressed their views in a number of pointed and able articles. Our readers will find many excellent things well-said in this series of communications, and we submit them as meriting careful perusal. Several other interesting articles were received too late to be available.—Ed.]

## Mr. Coles of Indiana says Citizens may Discuss Court Decisions.

Editor CASE AND COMMENT:—

The idea advanced by Colonel Roosevelt before the Colorado legislature on August 29th is stated as follows (quoting from October CASE AND COMMENT): "I am anxious that the nation and the state shall each exercise its legitimate powers to the fullest degree. When necessary they should work together, but above all they should not leave a neutral ground in which neither state nor nation can exercise authority, and which would become a place of refuge for men who wish to act against the interests of the community as a whole."

He then cites two decisions of the Supreme Court, which (in his opinion) creates such neutral ground, or "no man's land," where neither state nor nation has jurisdiction to control the operations of "men who wish to act against the interests of the community as a whole."

The cases referred to are the Knight sugar trust case and the New York bakeshop case. A summary of the opinions would too greatly extend this article, but it is presumed that the critics of Colonel Roosevelt will admit that the two decisions at least tend to produce the effect claimed, as I understand they do not deny it.

If the desire expressed by Colonel Roosevelt is not wrong either morally, legally, or politically, and the two decisions tend to establish a zone where men may mass wealth and exploit the whole people to the full extent of their ability for their extortionate gain, without the power of either state or nation to correct the abuse, it follows that either one or both of the decisions are wrong, and ought to be overruled either by the court or a constitutional amendment.

The Dred Scott decision was overruled by amendment of the United States Constitution.

Courts of appeal sometimes overrule their own decisions when they are convinced that they are wrong, and why has not a citizen of the United States a right to try and convince the Supreme Court that its decision is wrong, using any honorable and proper means in his power for that purpose, without being subject to the charge of "unwarranted assumption" and attacking the court?

When a court overrules its own former decision, the same logic as used by some of the critics would justify a charge that it is guilty of an unwarranted assumption and an unjustifiable attack on itself.

"A question is never settled until it is decided right." It is not only the privilege, but the duty of every American citizen, to do all in his power to have questions affecting the whole people decided right; and epithets do not amount to an averment of facts, nor a logical argument proving such efforts are wrong to an "attack" on the court.

JOHN B. COLES.

Rising Sun, Ind.

## Mr. Seiders of Toledo Denies the Existence of a Neutral Zone.

Editor CASE AND COMMENT:—

The query as to whether Mr. Roosevelt's criticism of the United States Supreme Court was justifiable brings forward a somewhat unique situation. His address before the Colorado legislature has been discussed pro and con in the newspapers, magazines, legal periodicals, in the clubs, and on the streets. But no one seems to have thought it worth while to ascertain whether Mr. Roosevelt was right in stating that, in deciding the Knight sugar trust case and the New York bakeshop case the Supreme Court had left "a neutral ground in which neither state nor nation can exercise authority."

The case of United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, was decided January 21, 1895. In that case the American Sugar Refining Company, for the purpose of obtaining a monopoly of the manufacture of refined sugar, purchased the stock in five Philadelphia sugar refining companies, issuing its own stock in payment. The United States brought action against all the companies concerned, for the dissolution of this "combination," as being in restraint of trade under the Sherman anti-trust law.

The Supreme Court held that while the acts of the American Sugar Refining Company were for the purpose of creating a monopoly, it was a monopoly of manufacture, and not of commerce. To give a few quotations:

"The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce."

"Congress did not attempt thereby [act of July 2, 1890], to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by

the states or the citizens of the states in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted."

"That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state."

It will be seen that there was no creation of a "neutral ground." It was expressly held that as the acts in question did not affect commerce, but were purely a monopoly, the correction must come by way of police regulation through the state.

Let us now see what next occurred.

On February 27, 1905, the same court decided the case of National Cotton Oil Co. v Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379. In that case several New Jersey corporations had formed a combination with the Taylor Cotton Oil Works, a Texas corporation, for the purpose of regulating and controlling the price of cotton seed throughout the state of Texas, thereby substantially creating a monopoly in that state. The state of Texas instituted a suit under its anti-trust laws to forfeit the license of the foreign corporations to do business in that state, in which it succeeded, and the action of the state court came for review before the United States Supreme Court, and the judgment of the state court was sustained on the authority of the Knight sugar trust case.

A still more interesting case is that of Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220, decided January 18, 1909. In this case the Standard Oil Company had purchased a majority of the stock in the Waters-Pierce Oil Company and then entered into an arrangement by which a virtual monopoly was had of the oil business in the state of Texas, contrary to its anti-trust and anti-monopoly laws. It will be noted that the method here pursued was similar to that which had been pursued by the American Sugar Refining Company in the Knight Case; only that in the latter case no arrangement had been formed with the Philadelphia companies, nor was any state law violated, or, at least, none was sought to be enforced.

The state of Texas brought suit to recover the penalties, under the statute, and for a forfeiture of the company's right to do business in that state, and the trial resulted in a verdict against the company of $1,623,500, and that its license should be forfeited. The state courts affirming this verdict and the judgment thereon, the case came to the United States Supreme Court, and the action of the state was there affirmed. This case squarely sustained the state in creating and enforcing a police regulation against monopoly.

In the meantime, the Supreme Court of the United States decided the cases of Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, and Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, in both of which there were combinations in restraint of trade and to obtain a monopoly through the control of interstate commerce.

It will therefore be seen that our Supreme Court has not left "a neutral ground in which neither state nor nation can exercise authority," but, on the contrary, taking the Knight sugar trust case as a basis for its acts, any state can enact a law, as has the state of Texas, against monopoly. Therefore, between such acts and the Sherman anti-trust law, the ground is completely covered.

As to the so-called New York bakeshop case (Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133), the Supreme Court simply decided that any law prohibiting persons *sui juris* from making contracts to work for longer than ten hours a day was an interference with the constitutional right of liberty of contract, it not appearing that the work of a baker was such as needed any special protection in the way of limited hours.

To say that the law was held unconstitutional "because, forsooth, the men must not be deprived of their liberty to work under *unhygienic conditions*," is an inexcusable declaration and wilfully misleading. The law in question has a number of sections, providing for "drainage and plumbing of buildings and rooms occupied by bakeries;" for "requirements as to rooms, furniture, utensils, and manufactured products;" for "wash rooms and closets, sleeping places;" for "inspection of bakeries;" and for "notice requiring alterations;"—all of which are in full force and unquestioned. The requirements are of such a strict nature that their enforcement will make "unhygienic conditions" impossible. In holding the ten-hour section unconstitutional the Supreme Court squarely said that if to work ten hours in a bakery was, by reason of the length of time, dangerous to the health any more than it is in any other occupation, then there would be a reason for the act, and its constitutionality unquestioned. But such is not the case, as we all know. The decision is expressly limited to persons *sui juris*, so that the right to enact a similar law as to those who have not arrived at the age of majority is unquestioned. To say that the "wrong undoubtedly exists" is an unwarranted assumption, and the court carefully points out that to work ten hours in a bakery is not any more dangerous to health than to work ten hours in an office, etc. Ten hours' work may be fatiguing, but it is not dangerous, and there is no reason why the American people should be deprived of the constitutional protection of liberty of contract simply because the New York bakers want shorter hours.

A perusal of the cases above cited will disclose that Mr. Roosevelt's remarks were founded on ignorance and false assumption, and that his criticisms were, therefore, unjustifiable and uncalled for from any point of view, and, when you take into account the possible effect, vicious.

CHARLES A. SEIDERS.

Toledo, Ohio.

## Mr. Beecher of Detroit Declares Reasonable Criticism Justifiable.

Editor CASE AND COMMENT:—

The Supreme Court of the United States is the greatest legal tribunal in the country, and its integrity and ability stand unquestioned; yet its decisions and the reasons for them, in instances, are not above criticism, for history furnishes evidence where cases have been criticized by the popular mind. In most instances these criticisms have arisen when the decision was rendered by a divided court. The very fact that a court is divided in its opinion shows that there is a difference of opinion as to what the law is on the subject; and any decision of a court, concurred in by less than a majority of the judges, has not the force of a precedent and therefore is not the law in the sense of establishing a definite legal principle, although it may be effective for the time being, and it is not infrequent that the principle enunciated in a dissenting opinion becomes the law in a later case.

The rule stands unquestioned, that due respect for the decisions of the body to whom the people have intrusted the power to interpret the primary authority of our government should be had by the people, "not on the mere ground of courtesy or conventional respect, but on the very solid and significant grounds of policy and of law." This principle, however, must be reasonably interpreted; for the court in its constitutional authority not infrequently has to pass upon or decide questions which affect intimately, seriously, and vitally the interests of every member of the nation, and it is in such cases that its judgment may give rise to criticism by not meeting the trend and spirit of the age. The spirit of the law, like that of society, is progressive, and all *new conditions* the law is capable of meeting; for the growth and expansion of the law is a continuous struggle between the general principles of law and the standard of reasonableness and common sense of society by which the new conditions affecting the people at large or the weak, in particular, in an advancing civilization, can be satisfied; for it has been well said that the law is founded on a comparatively few, broad, general principles of justice, fitness, and expediency, which are generally comprehensive enough to adapt and modify themselves to new institutions and conditions of society, *new modes of commerce, new usages* and *practices*, as the progress in the advancement of civilization may require. The modification of a principle to meet the *new conditions, modes of commerce, new usages* and *practices* which, under the general principle, would be legal and yet a menace to the general welfare of the people, is most desirable in the interest of progress.

In a case, like Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133, where, on the one hand, there is the police power,—a very indefinite power,—while, on the other hand, there is the constitutional safeguard,—a very general principle,—it is merely a question of inclusion and exclusion, and the cogent elements rest in the reasons given in the decision and whether they meet the conditions as they obtain. The modern spirit of the law to meet the new conditions is well expressed in Com. v. Hamilton Mfg. Co. 120 Mass. 383, where the court said: "The law, therefore, violates no contract with the defendant, and the only other question is whether it is in violation of any right reserved under the Constitution to the individual citizen. Upon this question, there seems to be no room for debate. It does not forbid any person, firm, or corporation from employing as many persons or as much labor as such person, firm, or corporation may desire; nor does it forbid any person to work as many hours a day or a week as he chooses. It merely provides that in an employment, which the legislature has evidently deemed to some extent dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in the commonwealth that reference to the decisions is unnecessary." This decision is also within the spirit of the other rule of law relating to contracts, which protects the weak against the strong.

The rights the people reserved to themselves, as voiced in the Bill of Rights, are to be reasonably interpreted, and if the people or, more particularly, those who have an inclination born of selfishness and greed to violate them, would exercise their *moral intelligence*, and *live up to them* in their daily conduct, no laws would be necessary to curtail the fundamental reserved rights. Many judges are overzealous in safeguarding these rights, to the detriment of progress, when the changing and varying conditions demand a limitation of these constitutional guaranties. Judges are human, and many of them hate to give up the old for the new; in other words, they are not cognizant of the spirit of progress as manifested in the times and in the law. In the fact of these principles and the existing economic and social conditions, Mr. Roosevelt is justified in his criticism. A reasonable criticism is justifiable where a court fails to be progressive in declaring the law. Some years ago when Mr. J. J. Hill said: "Decision or no decision, the men who own this stock will do with it as they please. The courts decide a great many things about which they know nothing. This is one of them. No court can run our property." Nobody seemed to find much fault with the tirade, not even Mr. Alton B. Parker, but how different when Mr. Roosevelt makes a legitimate criticism. It is well that under the existing economic political and social conditions there is one man, whose motives are sincere, who champions the cause of the people as against the interests, and voices the sentiments of the people.

Detroit, Mich. F. A. BEECHER.

## Mr. Napton of Montana Says This is a Government of Laws— Not of Men.

Editor CASE AND COMMENT:—

You ask in the last CASE AND COMMENT the opinions of your readers upon the expression of Mr. Roosevelt's views as they appear on page 229, concerning two opinions of the Supreme Court of the United States.

I give my views with much hesitancy, since I know how difficult it is, in limited space, to express views concerning these questions, which will not be erroneous. Kent, Story, Tucker, or Benjamin might do so, but for one not used to writing on constitutional questions, the task is difficult, if not impossible; it appears to be the latter in Mr. Roosevelt's case.

He says: "I am anxious that the nation and the state shall each exercise its legitimate powers to the fullest degree."

"Nation" and "national" are not to be found in the Constitution of the United States. At an early period of the debates in the convention which framed this instrument, the committee of the whole reported this resolution: "That a national government ought to be established." On the 20th day of June, Mr. Ellsworth moved to amend it so as to read: "That the government of the United States ought to consist," etc. This motion was agreed to *nem. con.*, "which dropped," as Mr. Ellsworth observed, "The word 'national' and retained the proper title 'the United States.'" Votes were taken by which the word "national" was struck out wherever it occurred in the report of the committee of the whole. But it appears that the word "national" in the draft of the Constitution reported August 6th was stricken out of every clause in the Constitution reported, and never reappeared. So that the words "nation" and "national" as applicable to the Federal system and government are not to be found in the Constitution.

I take the above from Tucker's work on the Constitution of the United States,—the truest exposition of that instrument that has been written.

The former President should have said, in my view of the matter: "I am anxious that the United States of America and each state shall exercise, the former its constitutional powers, and the latter its reserved powers, to the fullest extent."

The misuse of this term has caused a very erroneous popular conception of the true nature of our Federal system. Most of our foreign population—and they are coming in by the millions—have an idea that the United States exercises all the powers formerly exercised by the King of Prussia or at present by the Shah of Persia; and a government of laws, and not of men, is absolutely foreign to their conceptions; and I think it is true, although I hope I am in error, that a large majority of our voting population think that the government is a government "of the people, for the people, and by the people."

It appears to me that all women, all tyrants, and Mr. Roosevelt conceive of government as a purely personal affair; and that this conception, instead of being "progressive," is about the oldest Old Man of the Sea with which the human race is acquainted.

Mr. Roosevelt objects to any neutral ground where neither state nor *nation* can exercise authority, losing sight of the fact that no such neutral ground can possibly exist under the Constitution. He calls the decision in the Knight sugar trust case one which renders it exceedingly difficult for the people to devise any methods of controlling and regulating the business use of great capital in interstate commerce,—a decision "nominally against national rights, but really against popular rights." The Supreme Court is much like the Pope in matters of doctrine,—it is infallible; its decisions may be "against law" as law is understood by one or the other of the parties litigant, but as soon as made, it becomes the law.

It is, of course, the right of anyone to criticize a decision of that court or of any other court. As to its being a contempt of court to criticize a past decision of this court such a conception is quite consistent with the ideas of these people,—that the President is Czar, the Supreme Court a body of men unrestrained in power, the Congress another Parliament of England.

Mr. Roosevelt mentions these cases "merely to illustrate the need of having a truly national system of government, under which the people can deal effectively with all problems, meeting those that affect the people as a whole by affirmative Federal action, and those that affect merely the people of one locality by affirmative state action."

The most interesting views CASE AND COMMENT could publish upon these constitutional remarks by the "Rough Rider" would be the views of President Taft concerning them.

Lincoln, if memory serves us right, also criticized a decision of the Supreme Court. The exercise by the United States of power to prevent slaves from being taken into the territory of the Louisiana Purchase in violation of the decision of the Supreme Court was or would have been an act of anarchy; and neither one so high as our distinguished former President, nor the lowest emigrant who comes to our shores, fleeing from the unjust governments of his home, should ever forget that our American idea of government is a government of laws,—not of men.

Polson, Mont. H. P. NAPTON.

## Mr. Dyer of Minneapolis Believes Decisions Criticised Will Eventually Be Set Aside.

Editor CASE AND COMMENT:—

In an address at Denver, Colorado, delivered before the Colorado legislature on August 29th, Mr. Theodore Roosevelt made a severe criticism against decisions of the United States Supreme Court in two cases, namely: United States v. E. C. Knight Co. and Lochner v. New York. The first-named case is

referred to in his address as the Knight Sugar Trust case, and the second case is referred to as the New York bakeshop case.

The question has been raised as to whether Mr. Roosevelt was justified in making such criticisms against the decisions of the court. Some have even gone so far as to say that he was in contempt of court in openly voicing his criticism at such time and place.

I do not understand how anyone can make that statement, as I see no way in which Mr. Roosevelt can be found in contempt of court, either direct or constructive. If. Mr. Roosevelt had occupied a government position at the time of making such criticisms, or if he were a practising attorney, and as such had been the attorney on one side to present the case to the Supreme Court, such a decision as to his being in contempt of court would bear weight. Not that I think that because of his having been President he is thereby entitled to openly, or in any other way, criticize the decisions of our courts. It is a very dangerous thing for any man to criticize a decision of any court, and especially so the decisions of the United States Supreme Court, the highest and most honored court in our country.

Were such a thing to become a common practice, it would very quicky bring about a very serious state of affairs.

That we may the better see whether such criticisms were justified, let us look briefly at the cases in question.

First: United States v. E. C. Knight Co.

Mr. Roosevelt says, in general: "I am anxious that the nation and the state shall each exercise its legitimate powers to the fullest degree. When necessary, they should work together, but, above all, they should not leave a neutral ground in which neither state nor nation can exercise authority, and which would become a place of refuge for men who wish to act against the interests of the community as a whole."

In the decision handed down by the Supreme Court in this case, it has rendered it, in the future, exceedingly difficult for the nation to effectively control the uses of corporate capital in interstate business, as the nation obviously was the sole power that could exercise this control.

Mr. Roosevelt says of the decision: "It was a decision nominally against national rights, but really against public rights."

Second: Lochner v. New York, referred to as the New York bakeshop case.

This is a case of vast importance to every city in the United States, and the decision of the Supreme Court in this case should be read and studied by all the members of the bar, and by all citizens who are interested in public welfare.

In all large cities the baking business is, in most cases, carried on under unhygienic conditions. The ill effect of working under such conditions soon begins to tell on the people employed. For men, and in a number of cases women and girls, to be compelled to work in such unhealthful places as many of the large bakeshops of our cities are, is not only against the welfare of the workers, but against the public welfare.

The legislature of New York passed, and the governor signed, a bill remedying these conditions in that city. It was right and proper that such action should be taken, and New York state was the only body that could deal with them; it was a matter in which the nation had no power.

Mr. Roosevelt, speaking of the decision, says: "But the Supreme Court of the United States possessed and unfortunately exercised the negative power of not permitting the abuse to be remedied. By a five to four vote they declared the action in the state of New York unconstitutional, because, forsooth, that men must not be deprived of their liberty to work under unhygienic conditions."

Many will, no doubt, say that such sentiments should never be expressed against the decision of any of our courts by any man. Such has been said in the past few weeks by many in all parts of the country. But do we mean to take the stand that if a decision of our courts in a case so vital to the public interests of our cities as this one is, and where action has been taken by the proper bodies in our state to remedy these conditions, that if such decision sets aside all such action on our part, that we shall be compelled to sit still and let such a decision rest, and the men and women and girls in our cities be compelled, year after year, to work under conditions which are in many cases unfit for any human being to work in, until sickness compels them to leave these places?

Is Mr. Roosevelt the only man who has ever taken it upon himself to openly criticize a decision of the Supreme Court of the United States? No, he is not, and that we may compare a criticism of another man with this one I will quote a few statements from that case.

I refer to the debates between Lincoln and Douglas during 1857 and 1858 relative to the Dred Scott Case. Mr. Lincoln, in speaking of the decision handed down by the United States Supreme Court in that case, says: "But we think this decision erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this."

"We offer no resistance to it. I now repeat my opposition to the decision,—I do not resist it. We abide by the decision, but we will try to reverse that decision.

"By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs."

Now mark these words which Lincoln uses: "I believe the decision was improperly made, and I go for reversing it."

Can we find an instance where stronger or more emphatic language has been used against a decision of the Supreme Court of the United States? Is there any reason why a criticism on a decision of that court has not as much right to be made now as then? The Supreme Court at that time commanded just as much respect as it does to-day. Will we say that

such remarks made by Lincoln then placed him in contempt of court, or that he was not justified in making such statements against the decision as he did? If we say yes, then we must rightly place Mr. Roosevelt in the same place.

But before we take issue on that question, let us look at the dissenting opinion of one of the justices of the Supreme Court. I refer to the opinion of Justice Harlan, dissenting, in the Knight Case.

"This view of the scope of the act leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one state to another state. I cannot assent to that view. In my judgment, the general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one state only, but throughout the entire country."

"The doctrine of the autonomy of the states cannot be properly invoked to justify a denial of power in the national government to meet such an emergency. The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one state. Its authority should not be so weakened by construction that it cannot eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish."

It seems to me that the above language of the learned justice gives the danger to which a decision as handed down in the Knight case will result in if allowed to stand.

Again, in the bakeshop case we have the opinions of three of the justices, dissenting, which shows the right which the state has to act in such matters, and after speaking of the existing conditions under which the people have to work, and reasons why they should be changed, they say:

"If such reasons exist, that ought to be the end of the case, for the state is not amenable to the judiciary, in respect to its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. We cannot say that the state has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the state alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a state are primarily for the state to guard and protect."

There we have one of the strongest statements that could possibly be made as to the rights of a state to attend to matters of this kind. Are we then to sit back, and let the court overthrow all the right which the state has in a case of this kind? If this were a case that affected the state of New York alone, it would be bad, but this is a case that will be relied upon by defendants in similar cases all over the United States, and it is for that reason that such pressure should be brought to bear that the Supreme Court may see the justice of such criticism as is made, and that they will reconsider their decision and set it aside.

I think that the above statements by the learned justices who dissented to the opinion as handed down by the court give Mr. Roosevelt sufficient grounds for making the criticism he did on this case. It seems to me that the words which Mr. Roosevelt used in his message to Congress, on December 3d, 1906, when he was President, may well be applied here. At that time he said: "Just and temperate criticism, when necessary, is a safeguard against the acceptance by the people as a whole of that intemperate antagonism toward the judiciary which must be combated by every right-thinking man, and which, if it became wide-spread among people at large, would constitute a dire menace to the Republic."

After a careful study of the facts in these two cases, I cannot help but feel that Mr. Roosevelt was perfectly justified in making the criticisms which he did against the decisions of the United States Supreme Court, and I believe that the day will come when this court will set aside these decisions.

Minneapolis, Minn. GEORGE C. DYER.

# New or Proposed Legislation

Written laws are formulas in which we endeavor to express the least imperfectly possible that which natural justice demands.—Victor Cousin.

**Uniform Law of Wills.**—We are indebted to Mr. W. O. Hart, of New Orleans, Louisiana, chairman of the committee appointed by the American Bar Association to draft a proposed uniform law of wills, for a copy of two proposed acts, the first of which has been approved by the Conference of Commissioners of Uniform State Laws, and is to be sent out to the different states with the recommendation that it be presented to the legislatures for adoption. The second act was recommitted, and the subject will be taken up at the next meeting of the Conference.

The acts are as follows:

"An Act Relative to Wills Executed without This State and To Promote Uniformity among the States in That Respect.

"Be it enacted, etc.: A last will and testament executed without this state in the mode prescribed by the law, either of the place where executed or of the testator's domicil, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state; provided, said last will and testament is in writing and subscribed by the testator."

"An Act To Establish a Law Uniform with the Laws of Other States Relative to the Probate in this State of Foreign Wills.

"That any will duly admitted to probate without this state, and in the place of testator's domicil, may be duly admitted to probate and recorded in this state by duly filing an exemplified copy of said will and of the record admitting the same to probate; and such will shall then have the same force and effect as if originally proved and allowed in this state."

**Wills and Succession.**—Mr. Ernst Freund, professor of law in the University of Chicago, in reviewing recent legislation upon this subject in the New York Education Department Bulletin, states that "Kansas enacts (Laws of 1907, chap. 430) that in all actions to contest a will, if it shall appear that such will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing and preparing the same, was the confidential agent or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall be affirmatively shown that the testator had read or knew the contents of such will, and had independent advice with reference thereto. At common law, it seems, either one of the two requirements may rebut the presumption of undue influence.

In the matter of descent and distribution the tendency to favor the surviving husband or wife continues to be noticeable. Thus New Jersey (Laws of 1908, chap. 316) changes the former law, copied from the English statute of distributions, by giving the widow the whole, instead of the half, of the personal estate, if there are no children; Idaho likewise gives the surviving spouse all, if brothers or sisters of the deceased are otherwise the nearest of kin (Laws of 1907, p. 338). California (Laws of 1907, chap. 297), after several fluctuations, reverts to the rule which allows grandchildren as well as children of deceased brothers or sisters to take by representation.

Nebraska (Laws of 1907, chap. 49), in giving the surviving spouse one third, if all the children are his or hers, and one fourth only, if some of the children of the deceased are of another mar-

riage, introduces a distinction which seems novel in American law. By the same act, Nebraska substitutes absolute estates for the life estates of dower and curtesy.

Indiana (Laws of 1907, chap. 95) and Kansas (Laws of 1907, chap. 193) debar the person who has unlawfully caused the death of the deceased, from all share in his estate. The supreme court of Kansas had refused to reach the same result by judicial legislation (72 Kan. 533).

**The Abolishment of Private Seals.**—The committee of the West Virginia Bar Association on judicial administration and legal reform presented the following statement in support of their recommendation that private seals be abolished: The execution of a document, by the use of the seal of a natural person, has come to us from medieval times. We may find the necessity for the ancient seal in the ignorance of letters and in the scarcity of writing appliances. It was then the highest evidence of genuineness; and the very pains and deliberation required for physical execution entailed the consequences of solemnity and estoppel attaching to the transaction.

No longer does an illiterate lord among the Crusaders need to attest, before the walls of Jerusalem, some instrument to be used in his distant fatherland, by impressing the sign blazoned on his shield and banner, to prove his act,— his *factum*.

As time has progressed, the best guaranty of authority is the personal, written signature.

The diffusion of knowledge, the practice of writing, and the present convenience for signing, have done away with every reason for the use of the crude and cumbersome device of the darker period.

Why did the legislature substitute the scroll, sometimes designated as a scrawl? Why was not the seal and its substitute abolished altogether?

The reason may be found in the general doctrine relating to deeds and sealed instruments. Certain contracts are required to be by deed, in land matters. Bonds are necessary. Peculiar rights attached to specialties. The seal always imports consideration. Until recently it withstood the lapse of time, under the statutes of limitation, four times as long as the simple contract; and in the long ago, no paper could be taken out by a jury, unless under seal, because juries could not read, but were supposed to be familiar with the seals of the vicinage.

In Cooper v. Rankin, 5 Binn. 613, and Alexander v. Jameson, 5 Binn. 238, we find that the impression of a tooth was equivalent to stamping by a seal. Hence the attestation of a deed by William the Conqueror to one Rawdon:

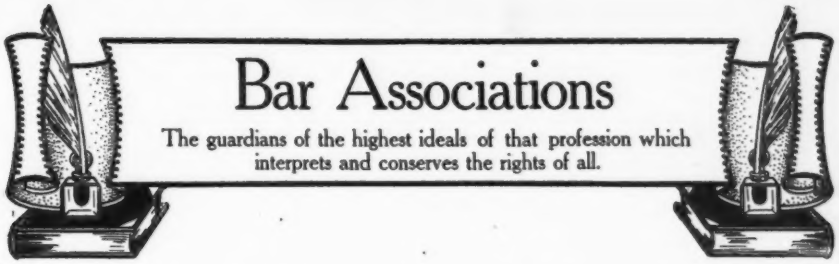
> "In token that this thing is sooth,
> I bite the white wax with my tooth."

The author of our scroll substitute saw that the reason of the seal no longer existed. He was willing to get rid of the wax and taper and tooth or fish's tail, or whatever figure there might be, and to put a writhing worm in its place; and so we have to-day a vermiform appendix, and we submit that the time has come for cutting it out.

Nearly all deeds of importance are now printed or typewritten. The stenographer takes from dictation, and the printer makes blanks to sell. The stenographer and the printer, as sensible people not learned in the law, do not know the force of the scroll, and sometimes omit it. It is questioned whether the typewritten word ("seal") in parentheses, now satisfies the Code; and we have seen an executed deed with only one part of the bracket used.

The present importance of the scroll is the best reason for destroying it, but it should be so done as not to disturb existing laws dependent upon it.

In present circumstances, we must save deeds and private bonds, until a new code is set forth, but meantime, we believe that all private seals should be abolished.




### Proposed Commercial Code.

At the recent annual meeting of the American Bar Association, Mr. Joseph Wheless, of St. Louis, presented the following resolution, which was referred to the committee on commerce.

"Resolved by the American Bar Association, that the Federal Congress has plenary power, under the Constitution, to enact laws governing all phases of commerce between the states and with foreign nations, and incidentally to prescribe the form, terms, and conditions of commercial contracts and instruments used in carrying on such commerce, such as are now being sought to be made uniform by identical state legislation; and that such power may be exercised either by the enactment of a series of laws on the several subjects, or by a code of laws regulating all such general commercial acts and contracts; and,

"Resolved, that the American Bar Association hereby declares in favor of the enactment by the National Congress of a Federal commercial code embracing in one uniform legislative act all titles and subjects of interstate and foreign commerce, superseding thereby the conflicting regulations of the several states, tending to induce the several states to adopt the same regulation for their internal commerce, thereby securing a practical uniformity of legislation on commercial matters throughout the country, and placing United States on commercial equality in point of legislation with the enlightened commercial nations of the world."

While, to the lay mind, observes the National Civic Federation Review, there would seem to be an irreconcilable conflict between those who urge the centralization of power in the Federal government at Washington and those who would enlarge the powers of the states, yet when the arguments of the leaders of the two schools of thought are analyzed they generally amount to a declaration that each side favors the Federal control of those subjects which are interstate, and the state control of those which are intrastate. Their disagreement relates to the disposition of those matters which Mr. Bryan has said belong in the "twilight zone" where the line of demarcation is indistinct. The vital point in this great question to-day is, "What, in the interest of public welfare, can be better controlled by the Federal government and what by the states?" When it comes to such question as taxation—especially the general property and personal tax—compensation for accidents occurring to employees in the plants, mines, and factories of the nation, regulation of quasi municipal utilities, regulation of the thousands of state banks, savings banks, trust companies, building and loan associations, life and fire insurance, good roads building, child labor, prison made goods, arbitration and mediation in industrial disputes, and hundreds of other subjects, the states alone, under our present form of government, must have control.

True, the Constitution can be amended if the people so will; and a bill was introduced by Congressman Madden, of Chicago, at the last session of Congress, authorizing the submission of an amendment to the Constitution which would confer upon Congress the power to legislate upon almost every conceivable ill to which flesh is heir—political, economic, and sociological, physical and metaphysical. There is, however, much sentiment in commercial and industrial circles today that, impatient of the conflicting restraints imposed upon business by the

various state laws, is naturally turning to the Federal government for relief. All of which means as is well stated by several writers in a recent issue of the Civic Federation Review, that unless the states are aroused to do their full duty there is a likelihood of this impatience resulting in a broad extension of Federal powers.

### Sherman Anti-trust Law.

In a recent address before the Lehigh County Bar Association, Mr. Marcus S. Hottenstein, of Allentown, Pennsylvania, said in part: "Since the enactment of the anti-trust law in 1890,—twenty years ago,—according to information recently received from the Attorney General of the United States, there have been filed in the various United States courts only thirty-six bills in equity for violation of the law, and only thirty-eight indictments have been presented.

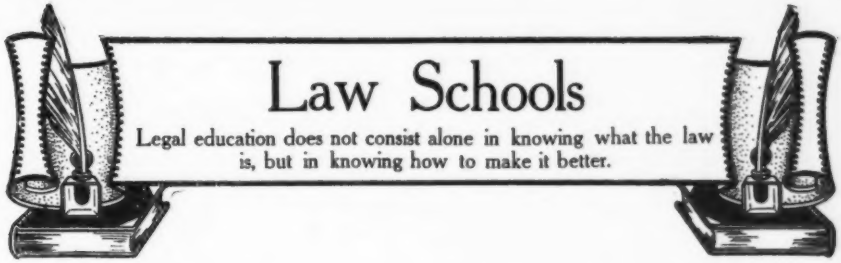
"The limited number of cases brought under the law is an index of its ineffectiveness, which has been due somewhat to the difficulty of securing evidence. In 1906, however, the United States Supreme Court slightly diminished this difficulty by holding that a corporation can be compelled to produce its books in court, even though the books contain evidence that might tend to incriminate the corporation, and also that the officials of the corporation cannot be excused from testifying, on the plea that their evidence might incriminate the corporation of which they are employees.

"The Sherman anti-trust law is based upon the theory that, in matters of business, competition is advantageous to society, while monopoly is detrimental. It is the only Federal law that looks to the preservation of competition in business. One of the senators of the middle West is of the opinion that, if we are to maintain the competitive theory of industrial life, this law must be not only rigidly enforced, but strengthened from time to time, so that both monopoly, or any other effective form of domination, will be prevented.

"The trend during the last twenty years has been in the direction of consolidation, not away from it. Railroads and industries have been consolidated on a grand scale. The weak have fallen under the control of the strong, and to-day, under the Sherman act, we are witnessing the most momentous combinations of transportation and industrial activity.

"The problem is, indeed, not without its difficulties. The law favors keen and aggressive competition. A necessary consequence of such competition must inevitably be that one of the competitors will gradually become stronger and stronger, and the others weaker and weaker, and finally the accumulation of strength and influence on the part of the successful party may result in the annihilation of the weak competitors, and a monopoly has been created. The question in such cases is, Where shall the line be drawn? At what point shall a competitor be restrained from further competing, and to what extent? The iniquities of monopolies may be clearly seen, but it is not so easy to point out a way in which their creation can be prevented.

"To take from those who have acquired under our existing laws would be revolutionary, and could not be sanctioned. That so much concentration has resulted is due to our laws, and we are responsible for our laws. If the laws have been detrimental to the welfare of the public, the laws should be changed. If certain practices need to be curbed let the restrictions be imposed, firmly and with good judgment."




### Leland Stanford Junior University.

The annual smoker of the Law School of Leland Stanford Junior University was held the evening of October 14. The program consisted of songs and speeches. D. E. Roth, '09, student adviser, welcomed the faculty and new students, and spoke to some extent on the honor system. Professor F. C. Woodward, head of the Law School, and E. D. Lane, assistant district attorney of San Francisco, spoke on pertinent topics. L. Craven, '09, compared the work in our school with that of Harvard, and pointed out wherein we fell short. Refreshments were then served, after which the wiser students took advantage of the opportunity to better their acquaintance with the various members of the faculty. Some hundred and fifty of the two hundred and ninety odd members of the Law School and pre-legal department were present.

### Northwestern University Law School.

Professor Edwin R. Keedy, who has been abroad this summer in the interest of the American Institute of Criminal Law and Criminology, has returned to the Law School to lecture during the coming year. He presented extensive reports on "The Administration of Criminal Law in England," to the Institute, and also to President Taft, on the latter's express request.

Professor Keedy thinks that England is many years, if not a full century, ahead of us in criminal law procedure. He says he marveled at the speedy despatch of justice; all regard for mere technicalities being laid aside, and the time consumed between sentence and final judgment on appeal being, in consequence, remarkably short. A striking feature of the criminal trials is the speedy selection of a jury, there being practically no challenging of the veniremen as a result of the prevailing practice of an agreement on the venire, between the opposing counsel, before the trial begins. The judges exercise a much greater control over the trial,—examining jurors and witnesses and curbing counsel, and thus hurrying the case along.

The report concludes with a recommendation of many reforms in our criminal procedure, some of them being along the lines laid down by President Taft.

### University of Maryland Law School.

There are several changes in the faculty and courses of instruction on account of the death of the late John P. Poe and the resignation of Professor William T. Brantly. Mr. Charles J. Bonaparte, one of the most distinguished members of the bar and Attorney General of the United States in the Roosevelt administration, has become a member of the faculty and will lecture on the law of contracts in place of Mr. Brantly. Mr. William L. Marbury, a former graduate of the Law School and a member of the well-known firm of Marbury & Gosnell, will take a part of Mr. Poe's course and lecture on the law of torts.

The faculty has also determined to give to its students, in addition to its regular course by resident lecturers, special lectures from time to time by nonresident lecturers upon topics dealing with the history, development, or science of the law or special branches thereof. They have secured as the first lecturer in this special course that eminent jurist, statesman, educator, and legal author, Simeon E. Baldwin, lately chief justice of the

supreme court of errors of Connecticut, for some time professor of constitutional law and private international law in Yale, who will, on December 19 and 20, deliver two lectures on "International Private Law in the Twentieth Century."

These lectures will be open to members of the bar, and others who are interested.

### Is the Lawyer a Failure?

Dean William Reynolds Vance, of George Washington University Law School, is an active participant in the movement to uplift the legal profession. At the close of a powerful address the dean expressed himself as follows: "Bluntly put, the American lawyer has proved a failure. In no other free and civilized country are the laws so ill-administered as in the United States.

"We lead the world in most of the great struggles mankind is making, but, in the administration of the law, America lags two generations behind the rest of the civilized world.

"No constructive reforms of a comprehensive kind have been seriously attempted since the days of David Dudley Field, now passed a half century and more. Our inefficient procedure in civil actions is a reproach to the nation and a disgrace to the bar, while our procedure in criminal cases, with its enormous expense, its incredible delays, and its frequent and gross miscarriages of justice, is a stench in the nostrils of the nations.

"The legal profession in America is blighted by two serious faults: The first is a low moral tone manifesting itself in its worst form in deliberate preying upon the public, legal parasitism, and in its less repulsive form in a selfish indifference to the deep public interest, with which the calling of the lawyer is affected. The second is a lack of knowledge of the law as a science, as distinguished from knowledge of the law as a craft. The great majority of our lawyers are merely craftsmen, without real knowledge of the science of the law in the sense of knowing the history of its rules and processes, the social conditions out of which they sprang, as differing from the social conditions upon which they operate to-day.

"It is the great public which must act in self-protection. Just as it has declared that those who offer their services in the practice of medicine must first be fit to render services that shall be valuable, and not dangerous, so it must require of those who hold themselves out to render services in connection with the administration of the law, that they shall be fitly trained."

### International Law School at The Hague.

"Not the least of the interesting features in the twenty-sixth annual conference of the International Law Association, held in London," says the Chicago Post, "was the proposal for the establishment of a university of international law at The Hague. This subject, which is sometimes rather casually handled at the regular institutes of learning, is becoming not only more and more important as the world grows smaller, but more and more elaborate and complex. And The Hague, which seems bound to be associated for all time with the problems of international relationships, is obviously the place for a university which should specialize in this field with the same devotion and thoroughness as the great polytechnic institutions of the world in their particular fields."

### Uniform Course of Legal Study.

"I would like to see a uniform law in operation throughout this country," said Judge W. O. Hart at the recent session of the American Bar Association, "requiring all law schools to have, as near as may be, a uniform course of study, a uniform time of study, and uniform requirements for graduation; and another uniform law that a law-school diploma should give to the holder no rights except to entitle him to an examination or admission to the bar by the board of examiners in the state where the law school has its domicil."

# New Law Books

"Contracts in Engineering." —By James Irwin Tucker, B. S., LL. B. (McGraw-Hill Book Company, New York.) $3.00 net.

This book deals with the interpretation and writing of engineering-commercial agreements. The writer has found his preparation for the task in some fourteen years of the study, practice, and teaching of civil engineering, supplemented by a law-school course. He has aimed especially to familiarize the engineering student with the major principles of common law relating to contracts, and has stated the principles underlying successful specification writing for the benefit of engineers engaged in the practice of their profession. With the present commercial tendency of engineering, it is believed that the contracts of business demand the modern engineer's attention about equally with those of engineering construction. The work is not intended, however, to enable the engineer to dispense with the services of legal counsel, but to enable him to co-operate efficiently with lawyers and to appreciate better the need for their services. For teaching purposes extensive lists of quiz questions and problems (about 600 in number) have been introduced. A comprehensive index adds to the value of the book for purposes of reference.

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This unique book outlines the proposed activities of the "World Corporation" recently organized under the laws of the territory of Arizona. It is authorized to acquire, hold, or sell the bonds, stocks, or other securities of other corporations. Its capital stock is divided into common shares of the par value of $1 each and limited only in number to the number of dollars paid into the treasury of the Corporation for such shares. "World Corporation" aims to absorb the approved, listed, dividend-paying securities in all civilized countries approximating $100,000,000,000, and including the leading industries and transportation systems of the world. This universal combination would bring all men into one corporate body, annihilate national distinctions, displace all governments, and establish an era of world-wide co-operation.

This stupendous scheme is worthy of the genius of Jules Verne, and doubtless he could have utilized it as the plot of a splendid story. It seems, however, to be seriously submitted, and, whatever its faults, it does not lack in imagination, initiative or daring. Perhaps it is enough to say that "World Corporation," in its process of "benevolent assimilation" of the finances, industries, and political power of the world, is apt to encounter keen competition and strenuous opposition.

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"Foreclosure Practice."—129 Law Times, 505.

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"Prize."—129 Law Times, 499.

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"A Critique of the Austinian Theory of Sovereignty."—22 Green Bag, 514.

**Strikes.**

"The Newport Dock Dispute. (Liability of Public Authorities to Protect Strike Breakers from Violence.)"—26 Law Quarterly Review, 377.

**Taxes.**

"Local Government and Local Taxation."—129 Law Times, 493.

"Exemption from Taxation in Illinois."—43 Chicago Legal News, 91.

"Taxation and Insurance."—41 National Corporation Reporter, 321.

# Quaint and Curious

Truth is stranger than fiction.

**A Human Document.**—It will be remembered that H. Rider Haggard, in one of his stories, has the will of a shipwrecked man of wealth tattooed upon the shoulders of a companion, and represents the unique testament as having been admitted to probate in the chancery court in England. This flight of the imagination has since been justified by the action of a miser, named Monecke, who died in Mexico. His relations were unwilling that his body should be buried, as he had tattooed his will over his chest with some red pigment, instead of using pen and ink. The court directed that this remarkable "human document" should be transcribed and the copy duly attested in the presence of witnesses. This was done, and the court gave effect to its provisions.

**A Generous Testator.**—Lord Pembroke gave "nothing to Lord Say, which legacy I gave him, because I know he will bestow it on the poor;" and then, after giving other equally peculiar legacies, he finished with, "Item, I give up the ghost."

**A Bachelor's Will.**—A wealthy bachelor, says the London Mail, to the astonishment and dismay of his relations, left a considerable sum of money to provide pensions for a limited number of single ladies over sixty. These single ladies must show evidence, in order to sustain their eligibility, that they have rejected one or more advantageous offers of marriage. Apropos to this it seems that a while ago the will of an old gentleman was proved, leaving legacies to three ladies, "because," as he wrote, "they refused to marry me, and so to them I owe my earthly happiness."

**A Poet's Will.**— Joseph J. Cassidy, a Jasper county, Missouri, farmer, died recently and left two wills,—one in rhyme and the other in prose. The document in verse is void because it antedates the other. It reads as follows:

"I, Joseph Johnson Cassidy,
Do hereby publish my intent,
Being sound of mind and memory,
This, my will and testament,
That all my just debts first be paid,
Expense for burial and funeral made,
And all expenses made of late,
Out of my personal and real estate,
I do bequeath, devise, and give,
As long as she, my wife, shall live,
Lot six in the original town of Lever,
To her, assigns, and heirs for ever.
To my adopted daughter, Marie,
I do devise and give in fee,
The southwest quarter of section seven
Township nine and range eleven,
To my two sons, Joseph and Beach,
I do devise one dollar each.
The residue of my estate,
I do bequeath to Mary Kate,
And hereby do appoint her
For my last will executor.
This the eighteenth day of May was done,
In the year of our Lord, nineteen one."

**Spirit Will Invalid.**—Judge Barnard, of the supreme court of the District of Columbia, has decided that a "spirit will" has no standing in court. The question arose in this wise:

William H. Crowell, a clerk in the Treasury Department, scribbled something on a paper on his deathbed. The writing was wholly illegible. So his wife took it to a medium for translation. The medium declared it was a will.

But when counsel for the widow presented this will in court Judge Barnard refused to recognize it. There was nothing in the law books about spirit wills or even spirit translations of wills. There was a lot about nuncupative, holographic, and other sorts of wills. But that was all.

Mrs. Crowell, the widow, presented to the court a petition that her late husband's brother, Major W. H. H. Crowell, of the Army, be appointed administrator of the estate. An affidavit setting forth the spirit message was filed with the petition. In it Mr. Crowell's spirit was represented as requesting the appointment of his brother as administrator and directing that $5,000 be set aside for the widow. The spirit message concluded:

"This is a beautiful world. It is better than the sixth auditor's office. They cannot put me out here."

The conclusion was regarded by the widow as incontestable evidence of the genuineness of the message. Mr. Crowell shortly before his death was retired for superannuation.

But the court was not convinced. Justice Barnard declared that he would be compelled to ignore the will, and he effected a compromise by appointing as joint administrators the widow and the son of the dead man.

**Westminster Abbey Rejected.**—The executors of the will of Miss Florence Nightingale, the "angel of the Crimea," who died August 13th, declined the offer of a public burial in Westminster Abbey. They considered themselves bound by the terms of her will, in which Miss Nightingale expressed a wish for a simple private funeral. Miss Nightingale was buried with the simplest ceremony at Wellow, Hampshire, where her parents are buried.

**Must not go on Lake.**—The will of Charles C. Dickinson, former president of the Carnegie Trust Company, who died a few months ago, contains a bequest of $4,000 for the education of his son Charles, at Cornell, with the strange stipulation that the son shall forfeit this allowance if he goes "to or upon Cayuga lake."

The lake is used by the Cornell crews and by students for canoeing and sailing. To a nephew he leaves $2,000 for educational purposes, with the same restrictions regarding Cayuga lake.

**Scatter My Ashes.**—The will of a California dentist, recently deceased, contains the following unusual provision: "I want my body burned and ashes scattered to the four winds. No religious services over my body, of any kind. Harlow White has promised to say a few words over me. I want the plainest box and a common express wagon to carry the body to the crematory. Cycle clubs invited to attend; beer and sandwiches and lively music furnished, if I have enough money to pay for it."

**Spinster's Strange Will.**—An extraordinary will has been left by an elderly unmarried lady who recently died in Vienna. Her property, amounting to about $250,000, is to be divided among her three nephews, now aged twenty-four, twenty-seven, and twenty-nine, and her three nieces, aged nineteen, twenty-one, and twenty-two, in equal parts on the following conditions:

The six nephews and nieces must all live in the same house inhabited by their aunt, with the executor, a lawyer. None of the nephews is to marry before reaching his fortieth year, nor the nieces before their thirtieth; the share of the one so marrying will be divided. Further, the six legatees are admonished never to quarrel. If one should do so persistently, the executor is empowered to turn him or her out of the house and divide the share. The executor is himself forbidden to marry or to reside elsewhere than in the house with the legatees. The testatrix is said to have made this peculiar will because her nephews and nieces continually worried her by asking her to give them money to enable them to marry,—requests she always refused.

**Church Tired of Hearing Old Will Read.**—The Supreme Court of the United States will be appealed to by officers of the Dutch Reformed Church of America to relieve that body from reading the tedious will of the Rev. Mr. Van Bunschooten at every official meeting of the church corporation. For seventy-five years the reading of the will has constituted a routine part of the business of every meeting of any corporate body of the Reformed Church in this country.

It appears that the church seventy-five years ago accepted a legacy of $20,000

from Rev. Mr. Van Bunschooten, who made his gift conditional, requiring that his will be read at every session of the church officiary forever. The money has long since been spent, but the duty of reading the irksome testament still hangs over the church.

**Provision for Possible Widows and Children**—The will of John B. Luther, formerly of Fall River, Massachusetts, probated in San Francisco and disposing of an estate of more than $100,000, contains a peculiar clause, which reads:

"I do hereby declare that I am not married and that I have no children. I have noticed, however, the facility with which sworn testimony can be procured and produced in support of the claims of alleged widows and adopted children, and the frequent recurrence of such claims in recent years. I therefore make express provision in this my last will as follows: I give and bequeath to such person as shall be found, proved, and established to be my surviving wife or widow, whether the marriage be found to have taken place before or after the execution of this will, the sum of $5, and to each and every person who shall be found, proved, and established to be my child by birth, adoption, acknowledgment, or otherwise, and whether before or after the execution of this will, the sum of $5, and I declare that I do intentionally omit to make for any of the persons in this paragraph referred to any other or further provision."

**A Novel Will.**—The will of John W. Wallace, of Brooklyn, who died a few months ago, contained the following novel provisions, which, it is reported, were literally carried out:

"That my body shall be placed in a pine box not to cost more than $5, placed in an express wagon, and taken to a crematory, and that after cremation the ashes shall be scattered in a field; the entire cost of the disposal of the body not to exceed $50.

"My reason is that I believe that a man gets out of life all that he is entitled to, according to the amount of brain and energy he puts in, and when he dies he should not occupy ground that may be needed for highways or for planting corn or for any other purpose that further generations may have for it. I believe that when I die, my money, if I have any, should go to those dependent upon me, and not into expensive coffins and flowers."

**Estate Left to the Deity.**—One of the most unusual wills ever recorded in Massachusetts was that of Charles Hastings, of Ashburnham, who leaves real estate valued at several thousand dollars, and transfers the title of the same to the Lord Jesus, appointing himself trustee of the property.

**Will of Sixteen Words.**—The shortest will on record in Connecticut was filed in the surrogate's office at South Manchester, Connecticut, last September. It contains exactly sixteen words, leaving the $50,000 estate of the late Knight D. Cheney, Jr., to his widow. The will is as follows: "I give and devise all my property, real and personal, to my wife, Ruth Lambert Cheney."

# Judges and Lawyers

Personal Items concerning Bench and Bar.

## Colorado's Lamented Jurist

Chief Justice Robert W. Steele, of the Colorado Supreme Court, died at Denver on October 12th, as the result of a stroke of apoplexy. He was born November 14th, 1857, at Lebanon, Ohio. In 1870 the Steeles moved to Denver, when Robert was but thirteen years old, and he grew to manhood there, attending the Denver public schools.

CHIEF JUSTICE ROBERT W. STEELE

Following his attendance at Columbia, Judge Steele returned to Denver, and was admitted to the bar in 1881. Previous to that time, in 1880, he was appointed clerk of the Arapahoe county court, and served until 1884. Then he resigned to take up the practice of law.

In 1891 Judge Steele was elected district attorney, and served with distinction until 1895, when his term expired, and he was appointed county judge to succeed Judge O. E. LeFevre, who had gone to the district bench. Judge Steele was re-elected in 1895 and 1898, and it was during his term as county judge that he laid the foundation for the juvenile court, afterwards developed by Judge Ben B. Lindsey. Judge Steele started conducting the cases of children separately from those of old and hardened criminals, and at the same time extended the protecting arm of the court over these first offenders hardly old enough to realize the seriousness of their offenses. He had been on the supreme bench for ten years and was a candidate for re-election at the time of his death. Four of the dissenting opinions handed down by him have gone deep into state history. The first of these was his dissenting opinion during the Peabody administration, when the supreme court held that the governor, under an emergency, had the right to suspend the writ of habeas corpus. He dissented again in the Toole case, when the supreme court took charge of the Denver election, and also when the supreme court set aside the Rush amendment. Lastly, he dissented when a $1000 fine was imposed upon Senator T. M. Patterson for contempt of court.

As a judge he had the unusual and wholesome faculty of detecting the very right of a case; and he also had those qualities of heart and mind which enabled him, to a very large extent, to put aside technicalities, and sometimes even, perhaps, precedents, and mete out common-sense justice.

### Oregon's Attorney General

HON. A. M. CRAWFORD

Honorable A. M. Crawford, Oregon's Attorney General, is a native of Delaware county, New York, where he was born in 1853. He was educated at Walton Academy and thereafter read law in the offices of N. C. & M. W. Marvin, of Walton, New York. He was admitted to the bar at Binghamton in 1878. Two years later Mr. Crawford went to Oregon, where he has since practised his profession. He served for a time in the Oregon state militia. He has held several public positions. From 1890 to 1894 he was receiver of the United States land office at Roseburg, Oregon. In 1896 he was elected a member of the Oregon legislature. In 1902 he was chosen Attorney General of the state and honored by a re-election in 1906. Mr. Crawford has conducted the affairs of this important office in an admirable manner.

Edwin B. McCarter, formerly of Columbus, Ohio, who was secretary of the Ohio State Bar Association (1904-1910) until he tendered his resignation at the last annual meeting of the association, has opened permanent offices in Finsbury Pavement House, Finsbury Pavement, London, E. C., for the practice of American law. Mr. McCarter's plan is to represent American law firms in England and on the Continent, and to place English solicitors in touch with the attorneys of the United States as occasion demands.

Judge F. M. Crosby, aged eighty years, died at Hastings, Minneapolis, on November 16th. He was the judge of the district court there, and was the oldest judge in years and point of service in Minnesota. He had been on the bench thirty-eight years.

### Montana's Attorney General

HON. ALBERT . GALEN

Honorable Albert J. Galen, Attorney General of Montana, was born in Jefferson county, in that state, on January 16th, 1876. He graduated at the University of Notre Dame, South Bend, Indiana, in June, 1896, receiving the degree of LL.B. The following year he attended the University of Michigan, and in June, 1897, received from that institution the degree of LL. B. He was admitted to the bar of Indiana in 1896, to the bar of Michigan in 1897, and in July of the same year was licensed to practise in Montana. In January, 1907, he was admitted to practise before the Supreme Court of the United States.

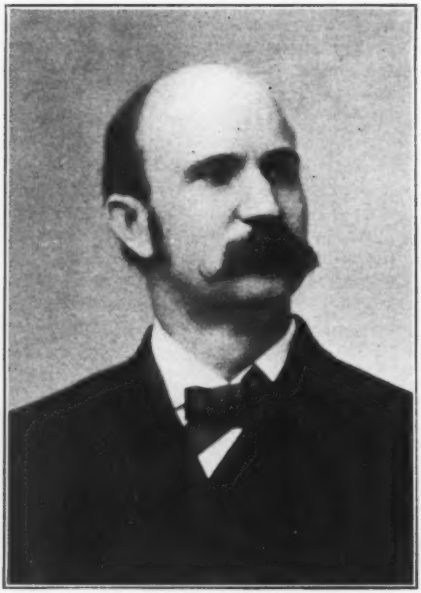
Mr. Galen commenced the practice of his profession in 1897 in the city of Helena, where he had grown to manhood, and has even since maintained an office there. His private business is now conducted under the firm name of Galen & Mettler. Mr. Galen has been remarkably successful in his chosen profession. He was elected to the office of Attorney General in November, 1904, and his able services in that position were recognized by re-election in November, 1908.

### New York Loses Former Governor and Statesman.

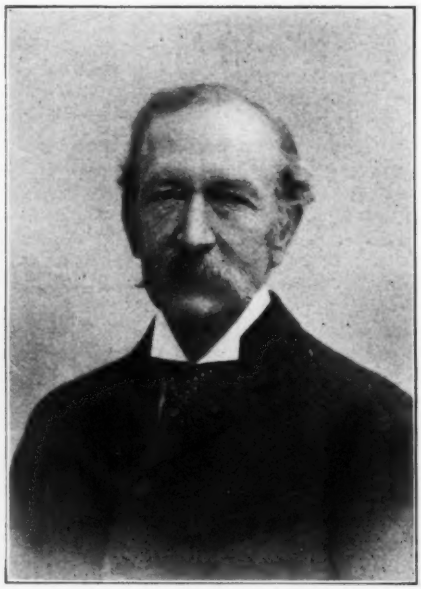
David Bennett Hill, who died at his home near Albany on October 20, was the last of the old school of New York Democratic politicians, and perhaps the most conspicuous in intellectual ability and the qualities of leadership.

Admitted to the bar at the early age of twenty-one, Mr. Hill at once actively interested himself in politics, and throughout his long and busy career was a consistent member of the Democratic

# Two Distinguished Statesmen Pass Away



HON. DAVID B. HILL



HON. LAMBERT TREE

party. At the same time he practised law with steadily increasing success, became recognized as one of the leaders of his profession in New York and was chosen president of the State Bar Association. After having served as a member of the state assembly and as lieutenant governor, he was elected governor and held that office until he became United States Senator. It was well known to his friends that he was far from satisfied with the distinguished public honors he had achieved, since his ultimate ambition was to be President.

Mr. Hill was meant by nature to be a great lawyer and a great statesman, rare as the combination is in fact. There was an old-fashioned simplicity and sturdiness in the administration of Governor Hill, as well as a brilliancy and force in Senator Hill, that justly command a degree of admiration. In the Senate he made the argument against the income tax provision of the Wilson tariff law that was afterwards made the basis of the decision of the United States Supreme Court against the validity of that section.

His private life was as nearly flawless as it seems possible to be; for he had absolutely no vices whatever, not even the most common habits of gentlemen concerning liquor and tobacco. It is known to comparatively few that, though a bachelor, he had always such a fondness for bright young men as to have one or more constantly being educated at his expense. His generosities in a score of directions are equally unknown to the public, but they were unfailing all his life.

### Illinois Loses Prominent Citizen and Former Diplomat

Judge Lambert Tree, who died on October 9th, was almost equally prominent in the business, social, and political life of Chicago.

He was born November 29, 1832, at Washington, D. C., and received his ear-

ly education in private schools of the city. Leaving the preparatory schools, he was sent to the University of Virginia, from the Law School of which he obtained a degree. He then returned to Washington, where he entered the law office of James Mandoville Carlisle, then a celebrated lawyer. It was while in this office that he first met Rufus Choate. There were no stenographers in those days, and Choate went to Carlisle's office looking for some one who could take down in long hand an argument he was to deliver in the supreme court. Young Tree had had some practice in this work in taking down the debates from the Senate galleries. He volunteered to aid Choate, and the offer was accepted. Tree was admitted to the bar October 15, 1855. Immediately he gave up his place in Mr. Carlisle's office, and, having consulted Senator Stephen A. Douglas as to the best part of the West in which to begin his career, he set out for Chicago.

Among the other letters which Mr. Tree carried was one to John M. Douglas, just then appointed attorney of the Illinois Central Railroad Company. Mr. Douglas offered him a position at a salary of $1,200 a year. That wage for those days was a big one, but Mr. Tree refused it. He said that he wanted to get into general legal practice.

The same day he arranged to get desk room in the office of Hervey & Clarkson, paying rent with services. The first week of his stay he got his first case. He was retained to defend the Illinois Central against a farmer whose cow had been killed by a train. Murray F. Tuley was the opposing counsel, but Tree won a nonsuit. His fee was $10.

Soon after this Hervey & Clarkson dissolved partnership, and Mr. Tree effected an arrangement with Mr. Clarkson, which later proved very remunerative.

The offices of Clarkson & Tree were on the second floor of a building at the southeast corner of Clark and Lake streets. It was in this office that Mr. Tree first met Abraham Lincoln. Lincoln then was practising in Springfield, and had come to Chicago on a matter of business in the transaction of which he was compelled to consult a law book. Clarkson & Tree had one of the best law libraries in town, and to their office Mr. Lincoln went for the book. He took the volume, which was much tattered, away with him, and nothing was heard of it for several weeks. Then Mr. Lincoln walked into the office one day with the book newly bound. "I hope you don't object," he said, as he left it.

From that day begun a business connection with Lincoln's Springfield office, which continued to the time that Lincoln became President.

At one time the Chicago firm had for collection a note belonging to a client in New York against a man residing in southern Illinois. The note was sent to the Springfield firm, with instructions to sue in the United States courts. This Lincoln's firm did and got judgment, but before execution could be levied the debtor came in and settled in cash for several thousand dollars. Lincoln's fee for this was $100.

In 1865 Mr. Tree became a circuit judge, serving four years. He ran for the United States Senate on the Democratic platform in 1885, but was defeated by John A. Logan by one vote. That same year he was appointed minister to Belgium, where he remained three years before going to St. Petersburg. During his residence in Brussels, Mr. Tree represented the United States government in the International Congress for the Reform of Commercial and Maritime Law, an assemblage of representatives of all civilized nations of the world.

After a year in Russia he returned to this country, and in 1891 was appointed by President Harrison as the Democratic member of the Monetary Commission.

He was a great advocate of a "Chicago Beautiful," and made many handsome gifts to the city. There are at present in Lincoln park two fine samples of his generosity to the city of his adoption. He was the donor of the two bronze statues,—one of LaSalle, which he gave to the city in 1889, and the other of a Sioux Indian, entitled "A Signal of Peace," which he donated in 1894. The latter is one of the sights which visitors always go to see when in Chicago, and is known all over the country as one of the greatest pieces of American sculpture.

Lambert Tree was a man of unusual

intellectual endowment and equally exceptional moral worth and courage. He attained enviable prominence at the bar, on the bench, and in the political arena. Judge Tree's active participation in public affairs came to an end years ago, but his interest in important civic questions and movements continued undiminished up to the moment of his death.

Judge James D. Fox, chief justice of the Missouri supreme court, died suddenly in St. Louis on October 6th. He was born in Fredericktown, Madison county, Missouri, January 23, 1847. He was educated at St. Louis University and admitted to the bar in 1866. He was elected judge of the circuit court in the twentieth judicial circuit, now the twenty-seventh, in 1890; was re-elected in 1886, in 1892, and again in 1898. In 1902 he was elected to the supreme bench.

Judge Fox, says the St. Louis Republic, was a lawyer of the old school. He was of the rugged type in personality and mannerisms, and his determination and strength of character, tempered by certain very human qualities, were of the sort that commands admiration. The unusual expressions of regret that follow his death show that the capacity for forming strong friendships commonly possessed by men of this type was his.

Those who came in intimate contact with Judge Fox were left in no doubt as to his natural aptitude for the legal profession. He came of a legal family and his long service on the bench had made him deeply read in the law.

A man of native shrewdness and mature equipment for a judicial service is lost to the state in his death.

Judge M. L. Maginnis, a prominent attorney of Ogden, Utah, and former justice of the supreme court of Wyoming, died at Ogden on October 26th. Judge Maginnis was fifty-two years old and was born at Somerset, Ohio. He came West in 1888, being appointed justice of the supreme court of Wyoming by President Cleveland. After serving his term in Wyoming he came to Ogden and built up a large practice in Utah, Idaho, Wyoming, and Nevada. It is said he was the youngest chief justice ever appointed.

### Illinois' Attorney General

HON. WILLIAM H. STEAD

Honorable William H. Stead, Attorney General of Illinois, is a native of that state, having been born in La Salle county June 12, 1858.

During the first sixteen years of his life, he remained on his father's farm, attending the district school in the winter and working on the farm in the summer. He attended the seminary at Onarga, Illinois, for one year, and, at the age of seventeen, taught his first village school at Milford, Illinois. Subsequently, for several winters he taught school in La Salle county and during the summers worked on his father's farm. By these means he earned sufficient money to give him a collegiate education.

He attended the normal school at Ladoga, Indiana, where he spent one year, later taking a course of study in DePauw University, at Greencastle, Indiana.

Returning from college, Mr. Stead entered upon the study of the law in the office of Honorable Washington Bushnell, a former attorney general of Illinois. He was admitted to the bar in 1883, and entered upon the practice of the law at Ottawa.

Since his admission to the bar, his energies have been directed along the lines of his chosen profession. Shortly after his admission to the bar, he held the office of city attorney of Ottawa. In 1896 he was elected state's attorney of La Salle county and served one term. In 1904 he was elected Attorney General on the Republican ticket. He had no opposition for the nomination for Attorney General in 1908, and at the election was again elected to that office, and is now serving his second term as Attorney General of Illinois.

# The Humorous Side

Mingle a little folly with your wisdom; a little nonsense now and then is pleasant.—Horace.

**Bequeathed a Career.**—"Hello, Johnny," said the village blacksmith, "I hear your paw has gone into politics." "Sure." "How'd that happen?" "Well, my uncle left him a silk hat and a Prince Albert coat in his will, and paw had to do something with them."—Washington Star.

**Getting Even.**—Lawyer—"In this will you really insist upon being buried at sea?" "Yes. You see, my wife says that when I'm dead she's going to dance on my grave."

**Her Share.**—H. Hamilton Fyfe, the English novelist who visited Reno to see the Jeffries-Johnson fight, said at a dinner in Chicago on his way back home:

"The Reno divorce colony was very interesting. There is quite a large colony in Reno of ladies and gentlemen who are engaged in divorcing their eastern husbands or wives.

"To talk of their marital relations with these people is difficult and dangerous work. It is like the case of the lawyer who said to the pretty widow:

" 'Well, madam, as your husband left no will, you'll of course get your third.'

"She blushed and smiled under her crape-trimmed bonnet.

" 'Oh, I hope to get my fourth,' she said. 'He was my third, you know.' "

**His Audience with Him.**—Nobody was more witty or more bitter than Lord Ellenborough. A young lawyer, trembling with fear, rose to make his first speech, and began: "My lord, my unfortunate client—— My lord, my unfortunate client—— My lord——"

"Go on, sir; go on!" said Lord Ellenborough; "as far as you have proceeded hitherto the court is entirely with you."—Life.

**His Occupation.**—A Boston lawyer, who brought his wit from his native Dublin, while cross-examining the plaintiff in a divorce trial, brought forth the following:

"You wish to divorce this woman because she drinks?"

"Yes, sir."

"Do you drink yourself?"

"That's my business!"—angrily.

Whereupon the unmoved lawyer asked:

"Have you any other business?"—Everybody's Magazine.

**Breaking the News.**—One of the most picturesque figures of the New York bar was the late Thomas Nolan, a lawyer, whose witty retorts furnished subjects for merriment at many a lawyers' gathering. Now, Nolan was at one time counsel for a poor widow who was suing a construction company for the death of her husband. The case had been placed upon the day calendar, but had been frequently postponed, and Mrs. Moriarity by the time she made her fifth call was in an exceedingly disturbed frame of mind, consequently the tones of Nolan's rich brogue were more than usually fervid as he fought against the sixth adjournment.

"I am sorry," said Justice Dugro, "but your opponent has shown me good cause for the adjournment, Mr. Nolan, and the case will therefore go over until to-morrow."

"Very well, sor," said the barrister, sweetly, "but might I ask wan personal favor of the coort?"

"Certainly, sir, with pleasure."

"Will your Honor kindly sthep down to my office and just tell Mrs. Moriarity that you have adjourned the case?"—Success.

A Ticklish Subject.—A great Scotch lawyer with wit and learning in equal parts was pleading before a judge with whom he was on most intimate terms, says the London Mail. Happening to be retained for a client of the name of Tickle, he commenced his speech:

"Tickle, my client, the defendant, my lord—"

He was interrupted by a laughing court.

"Tickle her yourself," said the judge promptly. "You are as able to do so as I am."

A Waste of Postage.—Several lawyers in a southern city were discussing the merits and demerits of a well-known member of the bar who had been gathered to his fathers, when one of the party related an incident of the time when he had studied in the old man's office.

It seems that the inefficiency of the copying clerk there kept the judge continually worked up to the point of explosion. One day a wire basket fell off the top of the clerk's desk and scratched his cheek. Not having any court-plaster, the young man slapped on three postage stamps and went on with his work.

Later in the day he had occasion to take certain papers to the court, and, forgetting all about the stamps, he put on his hat to go out. At the door he met the judge, who raised his head and fixed the clerk with an astonished stare.

"Anything wrong, sir?" stammered the bewildered clerk.

"Yes, sir, there is!" thundered the old gentleman. "You are carrying too much postage for second-class matter!"—September Lippincott's.

How Could He?—They had argued long and furiously over the question, "Can a man marry his widow's niece?" and the highly talented lawyer in the corner had waxed eloquent over the marriage laws of every state in the union, every country in the world, civilized and uncivilized, and had cited the affinity tables of every church, and even the legislation of Lycurgus down to that of Brigham Young, when a young man quietly announced his intense desire to be informed where the deuce a man was when his wife was a widow? Then the discussion closed down, and fourteen excited controversialists ordered ice water. —New York Times.

Admired His Vocabulary.—A story was recently told of the elder Judge Peckham, father of the supreme court justice. In the early days of dentistry a hickory plug was put into the cavity to fill the space where a tooth ought to be. This plug had to be gently pounded into its desired position. The old judge was somewhat addicted to strong language, and when the dentist began his work the judge indulged in some classic comment. As the tapping of the plug continued, he threw all dignity to the four winds of heaven, and his language became decidedly "more forcible than elegant." When, however, he arose from the chair, after what seemed to him an interminable period of agony, he pulled out all the stops in his vocabulary for a grand climax. The impression on his listener seems to have been deep and lasting. As the judge passed out, the dentist grimly remarked to a waiting patient:

"Wasn't it beautiful? It wasn't really necessary to pound half as long, but I did so enjoy his inflection that I almost pounded the hickory plug into splinters. Wonderful command of language the judge has!"

A Question of Precedence.—A dispute about precedence once arose upon a circuit between a bishop and a judge, and after some altercation the latter thought he should quite confound his opponent by quoting the following passage: "For on these two hang all the law and the prophets." "Do you not see," said the judge, in triumph, "that even in this passage we are mentioned first?" "I grant you," replied the bishop, "you hang first."